(18,797 and 18,798.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 201.

RICHARD H. FIELD, APPELLANT,

vs.

THE BARBER ASPHALT PAVING COMPANY.

No. 202.

THE BARBER ASPHALT PAVING COMPANY, APPELLANT,

vs.

RICHARD H. FIELD.

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a–1 UNITED STATES OF AMERICA, *set:*

Be it remembered that heretofore, to-wit, on the 4th day of January A. D. 1900, there was filed in the office of the clerk of the circuit court of the United States, for the western division of the western district of Missouri, a bill of complaint in the cause wherein Richard H. Field, is complainant and The Barber Asphalt Paving Company is defendant. Said bill of complaint, as amended by insertions made therein, is in words and figures as follows:

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant. } Bill of Equity.

To the honorable judges of the circuit court of the United States for the western division of the western district of Missouri:

Your orator, Richard H. Field, who brings this his bill in equity against the defendant, The Barber Asphalt Paving Company complains and says:

First. Your orator says that he is a resident of Kansas City in the western division of the western judicial district of the State of Missouri, and a citizen of said State, and that the defendant is now, and was at the times hereinafter named, a citizen and a duly created and organized corporation of the State of West Virginia, and engaged in street paving in Kansas City, Missouri.

2 Second. Your orator states that he is now and was at the times hereinafter named the owner of the following described real estate in Jackson county, Missouri, to-wit: Lots one (1), and two (2), and seven (7) and eight (8) in block thirty-nine (39); also lots three (3) and four (4) in block forty-one (41); also lot one (1) in block forty nine (49); also the south fifteen and 17-100 feet of lots one (1) and two (2) in block fifty (50); also an undivided half of lots one (1), two (2), three (3), four (4), five (5) eight (8), nine (9) and ten (10), in block forty five (45), all in Hyde Park, a platted addition on file and recorded in the office of the recorder of deeds of Jackson county, Missouri, at Kansas City, which real estate of your orator was, when the pavements hereinafter mentioned were contracted for and done, in the corporate limits of the city of Westport, then duly incorporated and duly acting as a city of the fourth class in the State of Missouri under an act of the General Assembly of said State, entitled "An act to repeal article five of chapter thirty (30) of the Revised Statutes of Missouri of 1889 and certain amendments

thereto—said article five (5) being entitled 'Cities of the fourth class,' and to enact in lieu thereof a new article providing for the government of cities of the fourth class." Approved April 11th 1895.

That said city of Westport has ceased to exist since the 2nd day of December, 1897, and the real estate aforesaid of your orator has been within the corporate limits of Kansas City, Missouri, by virtue of an extension of the territorial limits of said Kansas City duly made by it on the 2nd day of December, 1897, where by the whole of the territory of said city of Westport was included within the corporate and territorial limits of said Kansas City.

Third. That the defendant is the holder and owner of cer-
3 tain instruments of writing purporting to be special tax bills, issued Oct. 5, 1897 and Nov. 18, 1897 to it by said late city of Westport against said lots respectively according to their frontage on and for the paving hereinafter mentioned of Main street, from the center line of Springfield avenue or 31st street to the north line of Westport avenue, Baltimore avenue from Hunter avenue to the north line of Westport avenue, and Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue in said city of Westport, amounting in the aggregate to the sum of $3376.45, exclusive of interest and costs; and the defendant claims that the said special tax bills are liens respectively up on and against the real estate aforesaid.

Fourth. Your orator states that all of the real estate aforesaid is vacant and unimproved, and the greater part of the other lands fronting on the stre-t pavements aforesaid are vacant and unimproved and were at the times herein named; that your orator was not at any time herein named a resident of said city of Westport, but was at all of the times herein named a resident of Kansas City, Missouri, and the owner of the real estate hereinbefore described.

(Amendment to bill.)—That sections 88 to 95 inclusive of the act of the General Assembly of the State of Missouri aforesaid under which the tax bills in question are claimed by the defendant as liens upon the complainant's real estate, deprive the complainant of his said real estate without due process of law, and deny the complainant the equal protection of the laws afforded to resident owners of property in said city of Westport, and take his property for the private use of said residents, and violate section 1 of the fourteenth amendment to the Constitution of the United States; that said sec-
4 tions of said act of the General Assembly of the State of Missouri, are not general laws, but are local and special laws authorizing the creation of liens, and granting to resident owners of property in such cities special and exclusive rights, privileges and immunities against the paving or improvement of streets as a charge against their real estate not conferred upon non-residents who own real estate in such cities abutting on such streets, and violate section 53 of article IV and section 7 of article IX of the constitution of the State of Missouri.

(End to amendment.)

Fifth. That the tax bills aforesaid issued to the defendant for the

paving aforesaid on Baltimore avenue were dated November 18, 1897, and against lots described in charge second of this bill, in amounts as follows:—

Against lot	7,	block	39,	50	feet	front	.....	$141.96
"	"	8	"	"	60	"	"	.....	170.35
"	"	8	"	45	50	"	"	.....	132.92
"	"	9	"	"	"	"	"	.....	132.90
"	"	10	"	"	"	"	"	.....	132.92
"	"	1	"	49	98–62	"	"	.....	180.00
"	S. 15–17 ft. lot 2, block 50, 15–17 feet front								43.07

Total assessed against above lots for Baltimore Avenue paving $934.14

That the tax bills aforesaid issued to defendant for the paving aforesaid on Wyandotte street *was* dated Nov. 18, 1897, and against lots described in charge of this bill in amounts as follows:

Against lot	3	block	41	50	ft.	front	.....	$172.68
"	"	4	"	"	"	"	.....	172.68
"	"	1	"	49	98–78	"	.....	358.08

Total assessed against above lots for Wyandotte St. paving $703.44

That the tax bills aforesaid issued to defendant for the
5 paving aforesaid on Main street, were dated Oct. 5, 1897 and are against lots described in charge second of this bill, in amounts as follows:—

Against lot	1	block	39	60	ft.	front	.....	$266.13
"	"	2	"	"	50	"	"	.....	221.77
"	"	1	"	50	15	"	"	.....	66.50
"	"	1	"	45	50	"	"	.....	232.23
"	"	2	"	"	"	"	"	.....	232.23
"	"	3	"	"	"	"	"	.....	232.23
"	"	4	"	"	"	"	"	.....	232.23
"	"	5	"	"	55.05	"	"	.....	255.55

Total assessed against lots for Main St. paving..... 1,738.87

* * * * * * *

Sixth. For the purpose of forestalling any remonstrance from the residents of the city of Westport owning property fronting on such pavements, before any plans or specifications for them or either of them were made and filed in said city of Westport, and before any resolution or ordinance ordering such streets or either of them to be paved were passed, the defendant circulated among such residents a

petition in each case asking the board of aldermen of said
6 city of Westport to cause such work to be done and induced the said residents of said late city of Westport to sign said petition and to refrain from remonstrating against such improvements by promises of rebates on the amount of tax bills to be issued against their property for said improvements, and by other favors to such residents upon the cost of such work, and thereupon defendant caused to be drawn plans and specifications resolutions and ordinances for the work, which were adopted by the board of aldermen of said city of Westport, and the order for the work aforesaid, upon each of the three streets aforesaid, was in each case not due to any necessity therefor, or because the said board of aldermen deemed the same, or either of them, necessary to be done, but because of the lobbying and conduct aforesaid of the agents and servants of the defendant owners, and because of their lobbying with the board of aldermen of the city of Westport, and the defendant's undue and illegal influence over the board of aldermen of said city of Westport.

* * * * * * *

7 (Amendment to bill.)—Eighth. (*c.*) That previous to the work, or improvements in question, neither Main street, Baltimore avenue or Wyandotte street in said city of Westport, Missouri, at the places in question had been brought to the established grade thereof at the cost of said city of Westport or paid for out of the general revenue fund of said city, but the cost of bringing each of said streets to said grade was by the board of aldermen of said city included in special assessments of the cost of the work in question complained of
8 in complainant's bill, and on which special assessments the special tax bills in question were issued when it does not appear in the action taken by said board of aldermen concerning said improvements or either of them, that it was the judgment or opinion of said board of aldermen that the general revenue fund of said city was not in condition to warrant an expenditure therefrom for bringing the same to the established grade.

(*d.*) That it nowhere appears from the resolution of said board of aldermen declaring the work in question on Main street, Baltimore avenue or Wyandotte street, necessary to be done, nor in any other action of said board of aldermen previous to the enactment of the respective ordinances ordering said improvements to be made, and which was more than ten days after the last publication of the said resolutions respectively declaring the work or improvements in question necessary to be done, that a special tax was to be levied, or that tax bills were to be issued against the lots or lands abutting on said streets respectively, to pay for said work or improvements.

(*e.*) That it is stipulated in each of the contracts between the defendant and said City of Westport, for the work in question on each of said streets, that "the amount due contractor for work done under this contract shall be determined by the city engineer who shall measure the work and determine the actual quantity of work done

and aggregate sum due, according to the price herein named as consideration for doing the work. And this aggregate sum, less any and all deductions which the city engineer is empowered or instructed to make in accordance with the terms of this contract and specifications, shall in the event of the faithful performance and due acceptance of the work constitute the whole amount due under this contract, and for which special tax bills
9 shall be issued according to law, on the completion and acceptance of the work. * * * Any work not herein specified which may be fairly implied as included in this contract, of which the engineer shall be judge, shall be done by the first party, (the Barber Asphalt Paving Company) without extra charge. The first party shall also do such extra work in connection with this contract, as the engineer may especially direct, and if it shall be of a kind for which no price is stated in this contract, such price shall be fixed by the engineer but no claims for extra work shall be allowed, unless the same was done in pursuance of special orders as aforesaid, and the claims presented as soon as practicable after the work is done and before the final estimate. * * * To prevent all disputes and litigations, it is further agreed by the parties hereto that the city engineer shall, in all cases, determine the amount and quantity of the several kinds of work, which are to be paid for under this contract; and he shall decide all questions which may arise relative to the execution of this contract, on the part of the contractor, and his estimates and decisions shall be final and conclusive."

That the cost of the work in question was in each case under and according to the provisions of said contracts computed, determined and apportioned by the city engineer of said city of Westport, and not by the board of aldermen of said city.

(End to amendment)

Ninth. That the defendant had the exclusive control of the importation, sale and use of the genuine Trinidad Lake asphalt in and to the said city of Westport, at the times of the specification of the same by the city of Westport for the three street pavements here in question.

Tenth. That with a view to lessen and which tended to
10 lessen full and free competition in the importation, manufacture and sale of other good and useful brands of asphalt for street paving, the board of aldermen of said city of Westport at the instigation of the defendant, and by arrangement and agreement and combination with the defendant, specified and required in the resolutions, ordinances and contracts with the defendant, that each of the street pavements here in question should "consist of a genuine Trinidad Lake asphalt pavement."

Eleventh. Your orator is unable to state whether the work was done according to the specifications and contract aforesaid, but if it was, the prices agreed to be paid and paid in the special tax bills issued therefor, were unreasonable and exorbitant, and the said prices obtained by defendant therefor were due to its illegal action

aforesaid. The cost of the work on Main street and Wyandotte street instead of being $1.90 per square yard, the sum agreed to be paid and paid in special tax bills therefor, against the real estate fronting thereon, should not have exceeded 50c. per square yard, as the reasonable cost thereof; and the cost of the work on Baltimore avenue instead of being $2.00 per square yard, the sum agreed to be paid and paid in special tax bills therefor, on the real estate fronting thereon, should not have exceeded $1.25 per square yard as the reasonable cost thereof.

Your orator is willing and now offers to pay to defendant such reasonable and fair cost of said work as may be adjudged right and just herein, if for any reason the court should not hold the tax bills against your orator's property aforesaid wholly illegal and void.

Twelfth. That the reason this action has not been brought before now by your orator, is, that to within two days of the
11–13 present time, since and before the issue of the tax bills in question, he and the agents of the defendant have had pending, propositions to a compromise and settlement of the same to avoid litigation.

Prayer.

In consideration whereof, and forasmuch as your orator can only have adequate relief in this court where matters of this kind are properly cognizable and relievable; he prays as follows:—To the end *and* therefore that the said defendant, The Barber Asphalt Paving Company, may, if it can, show why your orator should not have the relief hereby prayed, and may according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make, to the matters and things hereinbefore stated and charged and to the several interrogatories hereinafter numbered and set forth, as by the note hereunto written it is required to answer but not under oath, the oath thereto being hereby waived, that is to say:

* * * * * * *

14 And your orator prays that said defendant be required to answer the premises, also that the court grant to him a preliminary injunction pending this suit, and a perpetual injunction at the final hearing, restraining the defendant, its agents and servants, from transferring the said tax bills, or any one of them, to any other person; also from bringing any action in any other court, also from prosecuting any action that may hereafter be brought in any other court, and that the defendant be required to bring the
15 said tax bills into this court and cancel and remove the same as claims or clouds against the real estate aforesaid of your orator, and for such other and further relief in the premises as the nature of the case may require, and to your honors may seem meet, and for the costs of this suit.

And your orator further prays that your honors will also grant

unto your orator a writ of subpœna of the United States of America, directed to the defendant, The Barber Asphalt Paving Company, commanding it on a day certain to appear before your honors and answer unto this bill of complaint and to do and receive what to your honors may seem meet and proper.

R. H. FIELD,
Complainant.

* * * * * * *

UNITED STATES OF AMERICA, *State of Missouri,* } ss:

R. H. Field, the complainant in the foregoing bill in equity, on oath says that the matters and things stated in said bill are true, as he verily believes.

R. H. FIELD.

Subscribed and sworn to before me this 4th day of Jan'y, 1900.

[SEAL.] ADELAIDE UTTER, *Clerk.*

Thereupon a writ of subpœna issued in the above entitled cause, which writ, with the return of the marshal thereon endorsed showing service of same, was filed on the 6th day of January, 1900.

Thereafter, to-wit, on the 5th day of February, 1900, defendant filed answer in the above entitled cause, which said answer
16 is in words and figures as follows, to-wit:—

In the United States Circuit Court in and for the Western Division of the Western District of Missouri.

R. H. FIELD, Plaintiff,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant. } No. 2407.

The Answer of The Barber Asphalt Paving Company, the Defendant, to the Bill of Complaint of R. H. Field.

The Barber Asphalt Paving Company, a corporation duly created and existing under and by virtue of the laws of the State of West Virginia, now and at all times hereafter, saving and reserving to itself all and all manner of benefit of exception which can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint, for answer unto the said bill, or unto so much thereof as this defendant is advised it is material or necessary for it to make answer unto, answering saith:

This defendant admits that the complainant R. H. Field, is a resident of Kansas City, in the western division of the western judicial district of Missouri, and a citizen of said State, and that the defend-

ant is now and was, at the times named in the bill of complaint, a citizen and a duly created and organized corporation of the State of West Virginia and was then and is now engaged in the business of paving streets in Kansas City, Missouri.

This defendant admits that the complainant R. H. Field, is now and was at the times referred to in the bill of complaint, the owner of the following described real estate in Kansas City, Jackson county, Missouri, to-wit: Lots one (1), two (2), seven (7), and eight (8), in block thirty-nine (39), lots three (3) and four (4) in block
17 forty one (41) lot one (1) in block forty nine (49) and the south fifteen and seventeen one-hundredths (15.17) feet of lot one (1) and lot two (2) in block fifty (50) in Hyde park, an addition to said city as said lots are marked and designated on the recorded plat thereof in the office of the recorder of deeds for Jackson county, Missouri; and this defendant denies that the said complainant, R. H. Field, is or was at the time of the institution of this suit, the owner of lots one (1), two (2), three (3), four (4), five (5), eight (8), nine (9) and ten (10) in block forty-five (45) in said Hyde park, or a one-half interest therein, or of any part thereof.

This defendant admits that the real estate hereinbefore described was at the time the street pavements mentioned and described in the said bill of complaint were contracted for and laid, within the corporate limits of the city of Westport, a city then duly incorporated and duly acting as a city of the fourth class in the State of Missouri, under and by virtue of the general laws of the said State applicable to cities of the fourth class.

This defendant states that it does not know and has no knowledge information or belief as to whether said city of Westport ceased to exist on the 3rd day of December, 1897, but states that on or about the said date, as it is informed and believes, the said city of Westport was and since that date has been consolidated with the city of Kansas City, Missouri, and that since the said date the real estate hereinbefore described is and has been within the corporate limits of the said city of Kansas City, Missouri, by virtue of an extension of the territorial limits of said city made on or about the date aforesaid.

This defendant admits that it is and was at the time of the commencement of this suit, the owner and holder of certain special tax bills, issued and delivered by the said city of Westport to this defendant on or about the 5th day of October, 1897, in part
18 payment of the work of paving Main street from the center line of Springfield avenue to the south line of Westport avenue, in said city with an asphalt pavement which are and were valid and subsisting liens against the lots in the blocks and for the amounts as follows, respectively: Lots one (1), block thirty-nine (39) Hyde Park, two hundred and sixty-six dollars and thirteen cents ($266.13); lot two (2) block thirty-nine (39), two hundred and twenty one dollars and seventy seven cents ($221.77); the south fifteen and seventeen one-hundredths (15.17) feet of lot one (1) block fifty (50), sixty-six dollars and fifty four cents ($66.54); total, five hundred

and fifty-four dollars and forty four cents ($554.44). Also lot one (1), block forty five (45) two hundred and thirty-two dollars and twenty three cents ($232.23); lot two (2) block forty five (45), two hundred and thirty two dollars and twenty three cents ($232.23); lot three (3), block forty-five (45), two hundred and thirty-two dollars and twenty-three cents ($232.23); lot four (4), block forty-five (45) two hundred and thirty-two dollars and twenty-three cents ($232.23); lot five (5) block forty-five (45) two hundred and fifty-five dollars and fifty-five cents ($255.55); total, eleven hundred and eighty-four dollars and forty-seven cents ($1184.47).

And that at the commencement of this suit it was and is the owner and holder of certain special tax bills issued and delivered by the said city of Westport to this defendant on or about the 18th day of November, 1897, in part payment of the work of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue in said city with an asphalt pavement which are and were valid and subsisting liens against the lots in the blocks and for the amounts as follows, respectively: Lot seven (7) block thirty-nine (39), Hyde Park, one hundred and forty-one dol-
19 lars and ninety six cents ($141.96); lot eight (8), block thirty-nine (39) one hundred and seventy dollars and thirty-five cents ($170.35); lot one (1), block forty-nine (49) two hundred and eighty dollars ($280.00); the south fifteen (15) feet of lot two (2) block fifty (50), forty-three dollars and seven cents ($43.07); total, six hundred and thirty-five dollars and thirty-eight cents ($635.38). Also lot eight (8), block forty-five (45) Hyde Park, one hundred and thirty-two dollars and ninety-two cents; lot nine (9) block forty-five (45) one hundred and thirty-two dollars and ninety-two cents ($132.92); lot ten (10) block forty-five (45), one hundred and thirty-two dollars and ninety-two cents ($132.92); total, three hundred and ninety eight dollars and seventy six cents ($398.76).

And that at the commencement of this suit it was and is the owner and holder of certain special tax bills issued and delivered by the said city of Westport to this defendant on or about the 18th day of November, 1897, in part payment of the work of paving Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue, in said city with an asphalt pavement which are and were valid and subsisting liens against the lots in the blocks and for the amounts as follows, respectively: Lot three (3) block forty-one (41), one hundred and seventy-two dollars and sixty-eight cents ($172.68); lot four (4), block forty-one (41), one hundred and seventy-two dollars and sixty-eight cents ($172.68); total, three hundred and forty-five dollars and thirty-six cents ($345.36).

This defendant denies that the real estate hereinbefore mentioned and described is vacant and unimproved and that the greater part of the other lands fronting on the streets hereinbefore mentioned are vacant or unimproved, or that they were unimproved at
20 the times the said pavements were constructed; this defendant states that the streets improved as aforesaid are streets running north and south in front of the lots hereinbefore described

and extend therefrom directly through the center and business portion of Kansas City, Missouri, which is a great and growing city which has more than two hundred thousand (200,000) inhabitants, and that the lots hereinbefore mentioned and described are in one of the most fashionable and rapidly developing residence localities of the said city; that all the lots and lands fronting on that portion of each of the streets improved as aforesaid are similarly situated with reference to the street so improved with other lots fronting thereon and are of equal value with the other lots fronting on said streets within the distance improved as aforesaid, and that the lots or tracts of land fronting on each of the said streets within the distance improved as aforesaid, were enhanced and increased in value by reason of the pavement of the said street with asphalt directly in proportion to the frontage of each lot or tract of land upon such improvement and to an extent greater than the amount charged against such lot or tract of land to pay for such pavement and as evidenced by the special tax bills hereinbefore referred to.

This defendants admits that the complainant, R. H. Field, was not, at the time the contracts were made for and the work of paving the streets done as aforesaid, a resident of the city of Westport, but states that the said Field at all such times was a resident of Kansas City, Missouri, and knew that the said contracts were being let and that the said work was being done, and that he did not at any time object to, protest or remonstrate against the doing of said work until after the completion thereof by the defendant herein and its acceptance by the said city of Westport, and that he, the said Field,
21 at all times consented to the paving of said streets by this defendant and the improvement of his property thereby, and has at all times heretofore and now has benefit of the said improvements.

This defendant denies that the act of the General Assembly of the State of Missouri referred to and described in the bill of complaint, takes or attempts to take from the plaintiff the said property for public use without just compensation, or that it deprives him of his said property without due process of law, or that it denies him the equal protection of the law, or that it violates section 1 of the fourteenth amendment to the Constitution of the United States.

This defendant denies that the tax bills hereinbefore mentioned and described as having been issued by the said city of Westport to this defendant in part payment of the contract price for paving Baltimore avenue and Wyandotte street were never delivered to the defendant by the said city of Westport, or other person authorized to deliver the same, and this defendant expressly denies that it now holds or that it did at the commencement of this action, hold any tax bill against lot one (1), block forty-nine (49), in Hyde park aforesaid for the paving of Wyandotte street, and admits that said lot does not front or join the said Wyandotte street.

This defendant denies that it circulated a petition among the residents of the city of Westport asking the board of aldermen of said city to cause the work of paving each of the streets hereinbefore

named to be done, and induced the said residents to sign said petition and to refrain from remonstrating against said improvement by promising rebates on amount of tax bills to be issued against their property for such improvements, or by promising other favors to said residents upon the cost of such work, and denies
22 that its actions in any of the proceedings leading up to or subsequent to the execution of the several contracts for the work herein referred to were in any respect improper or unlawful.

This defendant denies that it caused to be drawn plans and specifications, resolutions and ordinances for the work of paving hereinbefore mentioned, and denies that the order for the work aforesaid upon each of the three streets aforesaid, was in each case or in any case, not due to any necessity therefor, or because the board of aldermen of said city deemed the same or either of them, necessary to be done, and denies that such orders were made because of the lobbying and conduct of the agents and servants of the defendant and because of their lobbying with the board of aldermen, of the said city of Westport; and denies that the defendant had, or at any time exercised any undue or illegal influence over the board of aldermen of the city of Westport, and denies that it or any of its servants, agents or person under its control or direction lobbied with or had or exercised any undue or illegal influence over any of the board of aldermen of said city.

This defendant admits that separate contracts were duly entered into and executed between the city of Westport and this defendant for paving each of the streets hereinbefore named between the points designated with an asphalt pavement; and that said contracts and each of them were confirmed by ordinance of said city of Westport, that is to say, the contract for paving Main street was confirmed on May 19, 1897, and the contract for paving Baltimore avenue was confirmed August 24, 1897, and the contract for paving Wyandotte street was confirmed September 22, 1897.

This defendant denies that the city engineer's estimated cost of such work was submitted to the board of aldermen of the city of Westport as follows:—On Main street, ten thousand dollars;
23 ($10,000.00); on Baltimore avenue, twenty-five hundred dollars ($2500.00); on Wyandotte street, five thousand dollars ($5000.00).

This defendant admits that the cost of the work of paving Main street as provided in the contract therefor hereinbefore referred to was one dollar and ninety cents ($1.90) per square yard and for Baltimore avenue two dollars ($2.00) per square yard, and for Wyandotte street one dollar and ninety cents ($1.90) per square yard, and states that the nature, character and extent of the work to be done under each of said contracts was specifically stated in each of said contracts.

This defendant denies that the cost of the work provided to be done in any of said contracts exceeded the estimated cost of such work as made and submitted by the city engineer of said city to the board of aldermen thereof.

This defendant admits that the cost of paving Main street under the contract therefor hereinbefore referred to was forty-seven thousand and nineteen dollars and sixty-seven cents ($47,019.67) and that of Baltimore avenue was twenty-four thousand five hundred and twelve dollars ($24,512.00), and that of Wyandotte street was thirty-one thousand, nine hundred and eight dollars and fifty-four cents ($31,908.54) and this defendant states that the city engineer, prior to the making of each of said contracts, respectively, duly made an estimate of the cost of the work provided for in each of said contracts and submitted such estimate to the board of aldermen of the city of Westport, and that in each case the estimated cost of the work exceeded the price and cost thereof hereinbefore stated.

This defendant denies that the specifications, and resolutions, ordinances and contracts for the work hereinbefore referred to done on Main street and Wyandotte street were vague and in-
24 definite, and denies that there was no specification fixing or stating the depth or thickness of the base of broken stone to be laid in the existing macadam, under the three inches of pavement required, but states that the grades were duly established on each of the said streets, and were referred to in the said contracts, and the said grades, together with the plans and specifications of the said work were and are expressly referred to in each of the said contracts and made a part of the same, and that by the terms of the said plans and specifications the finished surface of the pavement provided to be laid in each of the contracts is fixed, and indicated with reference to the established grade of the said street respectively, and that it is thereby provided and stipulated that the broken stone therein called for should be laid on the macadam then upon each of the said streets of such thickness as to bring the same up to a plane parallel to and within three (3) inches of the finished surface of the pavement as indicated upon the said plans and specifications.

This defendant denies that it had exclusive control of the importation, sale and use of genuine Trinidad Lake asphalt in and to the city of Westport at the time of the specification of the same by the city of Westport, for the three street pavements herein referred to, and denies that it entered into any arrangement, agreement or combination with the board of aldermen of the city of Westport that each of said pavements should consist of a genuine Trinidad Lake asphalt pavement with a view to lessening full and free competition in the sale and importation of other good and useful brands of asphalt.

This defendant denies that the prices agreed to be paid to it by the city of Westport for constructing the street pavements herein-
before referred to were unreasonable and exorbitant, or that
25 said prices were due to illegal action in any respect on its part.

This defendant denies that the reason this action has not been brought before is that within two days of the time of commencement of this suit the complainant and the agents of defendant have had pending propositions to compromise and settle the same to avoid litigation.

This defendant states that the matter in dispute in this suit does not exceed exclusive of interest and costs, the sum or value of two thousand dollars ($2,000): that the complainant owned, at the time of the institution of this suit, and now owns separate lots or tracts of land which are described as follows: lots one (1) and two (2) and seven (7) and eight (8), in block thirty-nine (39); lots three (3) and four (4) in block forty-one (41); lot one (1) in block forty-nine (49), and the south fifteen and 17-100 (15.17) feet of lots one (1) and two (2) in block fifty (50) all in Hyde Park, an addition to the city of Kansas City, Missouri, and that each separate tax bill referred to and described in plaintiff's bill of complaint constitutes a separate lien and charge against one of said lots, which lot is described in the tax bill constituting the lien against it; that the following described lots, to-wit: the south fifteen and 17-100 (15.17) feet of lot one (1) in block fifty (50), lots one (1) and two (2) in block thirty-nine (39), in Hyde Park, front and abut on Main street in the said city of Westport, and are charged by the special tax bills aforesaid, only with the part of the cost for paving that street under the contract between this defendant and the City of Westport for that work, and the following described lots, to wit: lots seven (7) and eight (8), in block thirty-nine (39), lot one (1) in block forty-nine (49) and the south fifteen (15) feet of lot two in block fifty (50) in Hyde Park, front and abut on Baltimore avenue,
26 in the said city of Westport and are charged by the special tax bills aforesaid only with the part of the cost for paving that street under the contract between this defendant and the City of Westport for that work; and the following described lots to-wit:—lots three (3) and four (4) in block forty-one (41) in Hyde Park front and abut on Wyandotte street in the said city of Westport and are charged by the special tax bills aforesaid only with the part of the cost for paving that street under the contract between this defendant and the City of Westport for that work, and that the aggregate amount of the taxes against all of the lots owned by the complainant herein is fifteen hundred and thirty five dollars and eighteen cents, ($1535.18) and that the complainant, R. H. Field, does not and did not, at the time of the institution of this suit or at the times of the issuance of the tax bills hereinbefore referred to, own a one half interest in or any interest in lots numbered one (1), two (2), three (3), four (4), five (5), eight (8), nine (9) and ten (10) in block forty-five (45) in Hyde Park, against each of which a separate tax bill and lien has been issued and established, no one of which said bills exceeds the sum of two hundred and fifty-five dollars and fifty-five cents ($255.55), and all of which aggregate the sum of fifteen hundred and eighty-three dollars and twenty-three cents ($1583.23) and this defendant states that the complainant herein has stated and alleged in his said bill of complaint that he owned a one-half interest in the lots hereinbefore described for the sole purpose of making it to appear upon the face of the bill that this court had jurisdiction of the cause of action therein stated.

And this defendant denies all and all manner of unlawful com-

bination and confederacy wherewith he is by the said bill charged
27–31 without this, that there is any other matter, cause or thing in the said plaintiff's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge and belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

W. C. SCARRITT,
J. K. GRIFFITH, AND
E. H. JONES,
Solicitors for the Barber Asphalt Paving Company.

EDW'D L. SCARRITT, *Of Counsel.*

* * * * * * *

32 Thereafter, to-wit, on the 9th day of February, 1900, complainant filed replication in the above entitled cause, which said replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

R. H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant.

General Replication of R. H. Field, Complainant, to the Answer Filed by Above Named Defendant.

This repliant, the above named complainant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereto
33 saith that he doth and ever will maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is untrue, uncertain, evasive and insufficient to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

R. H. FIELD,
Complainant.

Thereafter, to-wit, on the 9th day of May, A. D. 1900, complainant filed a motion to amend bill of complaint, which said motion to amend is in words and figures as follows:

In the Circuit Court of the United States in and for the Western Division of the Western District of the State of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant.

Complainant's Motion to Amend Bill.

Complainant comes now and states to the court that since his reply to defendant's answer and during the taking of the testimony in the case, he has learned of the following errors and omissions in his bill that are material to his rights in the premises, and to the relief sought by him in this action.

(*a.*) That the date the city of Westport, Missouri, ceased to exist and became a part of Kansas City, Missouri, was December
34 2nd, 1897 and not December 3rd, 1897, as alleged in this bill.

(*b.*) That the laws governing cities of the fourth class under which the tax bills in question were issued also violate section 53 of article IV and section 7 of article IX of the constitution of the State of Missouri.

(*c.*) That previous to the work or improvements in question, neither Main street, Baltimore avenue or Wyandotte street in said city of Westport, Missouri, at the places in question had been brought to the established grade thereof, at the cost of said city of Westport, or paid for out of the general revenue fund of said city, but the cost of bringing each of said streets to said grade was by the board of aldermen of said city included in special assessments of the cost of the work in question complained of in complainant's bill and on which special assessments the special tax bills in question were issued, when it does not appear in the action taken by the said board of aldermen concerning said improvements or either of them, that it was the judgment or opinion of said board of aldermen that the general revenue fund of said city was not in condition to warrant an expenditure therefrom for bringing the same to the established grade.

(*d.*) That it nowhere appears from the resolution of said board of aldermen declaring the work in question on Main street, Baltimore avenue or Wyandotte street necessary to be done, nor in any other action of said board of aldermen previous to the enactment of the respective ordinances ordering said improvements to be made, and which was more than ten days after the last publication of the said resolutions respectively declaring the work or improvements in question necessary to be done, that a special tax was to be levied, or

that tax bills were to be issued against the lots or lands abut-
35 ting on said streets respectively, to pay for said work or improvements.

(e.) That it is stipulated in each of the contracts between the defendant and the City of Westport for the work in question on each of said streets that "the amount due contractor for work done under this contract shall be determined by the city engineer who shall measure the work and determine the actual quantity of work done and aggregate sum due according to the price herein named as consideration for doing the work. And this aggregate sum, less any and all deductions which the city engineer is empowered or instructed to make in accordance with the terms of this contract, and specifications, shall, in the event of the faithful performance and due acceptance of the work, constitute the whole amount due under this contract, and for which special tax bills shall be issued according to law, on the completion and acceptance of the work. * * * Any work not herein specified which may be fairly implied as included in this contract, of which the engineer shall be judge, shall be done by the first party, (the Barber Asphalt Paving Co.) without extra charge. The first party shall also do such extra work, in connection with this contract, as the engineer may especially direct and if it shall be of a kind for which no price is stated in this contract, such price shall be fixed by the engineer, but no claims for extra work shall be allowed, unless the same was done in pursuance of special orders, as aforesaid, and the claims presented as soon as practicable after the work is done and before the final estimate. * * * To prevent all disputes and litigations, it is further agreed by the parties hereto, that the city engineer shall, in all cases, determine the amount and quantity of the several kinds of work which are to be paid for under this contract; and he shall decide all ques-
tions which may arise relative to the execution of this con-
36 tract, on the part of the contractor, and his estimates and decisions shall be final and conclusive."

That the cost of the work in question was in each case under and according to the provisions of said contracts computed, determined and apportioned by the city engineer of said city of Westport and not by the board of aldermen of said city.

(f.) Wherefore the complainant asks the court to permit his bill filed in this cause to be amended as follows:

First. By changing the allegation of the date "the 3rd day of December, 1897" wherever it occurs in the bill by striking out the figure and abbreviation "3rd" and inserting in lieu thereof the figure and abbreviation "2nd," so as to make the same read "the 2nd day of December, 1897."

Second. By striking out the last sentence of the fourth charge of the bill and inserting in lieu thereof the following allegations, to-wit:—That sections 88 to 95 inclusive of the act of the General Assembly of the State of Missouri, aforesaid, under which the tax bills in question are claimed by the defendant as liens upon the complainant's real estate, deprive the complainant of his said real

estate without due process of law, and deny the complainant the equal protection of the laws afforded to resident owners of property in said city of Westport, and take his property for the private use of said residents, and violate section 1 of the fourteenth amendment to the Constitution of the United States; that said sections of said act of the General Assembly of the State of Missouri are not general laws, but are local and special laws authorizing the creation of liens and granting to resident owners of property in such cities special and exclusive rights, privileges and immunities against the paving or improvement of streets as a charge against their real estate
37 not conferred upon non-residents who own real estate in such cities, abutting on such streets, and violate section 53 of article IV and section 7 of article IX of the constitution of the State of Missouri.

Third. That all of charge eighth of the bill be stricken out and in lieu thereof, the allegations of paragraphs (*c*), (*d*) and (*e*) above set forth be inserted in said bill as the eighth charge thereof.

Fourth. Complainant further prays the court to grant such time to him and defendant from date of order on this motion to take further testimony upon the allegations contained in paragraphs (*c*) and (*d*) above set forth and as to the court may seem reasonable and just.

RICHARD H. FIELD,
Complainant.

Subscribed and sworn to before me this 9th day of May, 1900.

JOHN M. ORR,
[SEAL.] *Notary Public, Jackson County, Missouri.*

Thereafter, to-wit, on the 4th day of June, A. D. 1900, the following order was filed and entered of record in the above entitled cause:

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAV'G CO., Defendant.

Now come the complainant and defendant in above cause by their solicitors and submit complainant's motion to amend his bill which motion is by the court now sustained, and the complainant now amends his bill as asked in said motion and the complainant
38 is hereby permitted to take evidence on all or any allegations of his bill as amended within ten days from this date and the defendant shall have thirty days thereafter to take evidence on the

issues in the case and the complainant shall have ten days thereafter to take evidence in rebuttal of that taken by defendant.

By the court:

(Signed) JOHN E. CARLAND, *Judge.*

Dated June 4th, 1900.

Thereafter, to wit, on the 15th day of June, 1900, the following motion to amend bill was filed in the above entitled case:—

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant.

Complainant moves the court to permit him to perfect and amend charge "tenth" of his bill by adding thereto in conformity to the evidence taken in the case, allegations as follows:—

That the defendant, the city engineer, the board of aldermen and mayor of said city of Westport, conspiring, combining and contracting in restraint of trade and commerce among the several States and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri, caused to be specified in the resolutions and ordinances of said city and contracts for the paving in question that it should consist of a genuine Trinidad Lake asphalt, thereby meaning and intending the asphalt produced and existing in Trinidad lake, of the island of Trinidad without the
39 United States, and within the domain of another nation, and the defendant at and before the dates alleged in this bill monopolized and attempted to monopolize, combined and conspired with said city authorities and other persons unknown to complainant, to monopolize the trade and commerce among the several States as to the importation, sale and use of Trinidad Lake asphalt, whereby it had, and attempted to have, at the times here in question, the exclusive control of the importation, the sale and use of said asphalt, in and to the city of Westport, and Kansas City, Missouri, so that when the defendant induced and persuaded the city authorities of said city of Westport to specify genuine Trinidad Lake asphalt, in its resolutions, ordinances and contracts for the pavements in question, it had monopolized and attempted to monopolize a part of the trade and commerce of the several States and with foreign nations, all in violation of the act of Congress contained in the act of July 2nd, 1890, "to protect trade and commerce against unlawful restraints and monopolies." And the said resolutions and ordinances of said city of Westport also violate the commerce clause of section 8 of article 1 of the Constitution of the United States.

R. H. FIELD,
Complainant.

STATE OF MISSOURI, } ss:
County of Jackson, }

R. H. Field, the above named complainant, on oath states the allegations in the foregoing motion and those contained in the foregoing proposed amendment to his bill are true, and sufficiently appear in the evidence already taken, as he verily believes; that this motion is not made for vexation or delay and the defendant has twenty eight days yet under the order of this court of June 4th, 1900, within which to take testimony on this or any other
40 issue in this case.

R. H. FIELD.

Subscribed and sworn to before me this 16th day of June, 1900.
[SEAL.] ALFRED FIDLER,
Notary Public, Jackson Co., Mo.

My commission expires November 14, 1900.

Received of complainant copy of the above and foregoing motion and affidavit also notice of the filing of said motion, and that the same will be called up for disposition by the court at the opening of court on June 19, 1900, or as soon thereafter as the court will hear the same.

SCARRITT, GRIFFITH & JONES,
Solicitors for Defendant.

Thereafter, to-wit, on the 2nd day of July, A. D. 1900, defendant filed an answer to the amendments to the bill of complaint, which said answer is in words and figures as follows:—

In the United States Circuit Court, Western Division of the Western District of Missouri.

RICHARD H. FIELD, Plaintiff,
vs.
BARBER ASPHALT PAVING COMPANY, Defendant. } No. 2407.

The Answer of The Barber Asphalt Paving Company, the Defendant, to the Amendments to the Bill of Complaint.

The Barber Asphalt Paving Company, the defendant, now and at all times hereinafter saving and reserving unto itself all and all manner of benefit of exception which can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint herein and to the amendments heretofore made thereto, for answer unto the said amendments to the bill of com-
41 plaint or unto so much thereof as this defendant is advised is material or necessary for it to make answer unto, answering saith:

That it denies that the city of Westport ceased to exist and became a part of Kansas City, Missouri, on December 2nd, 1897, but states that on or about December 3rd, 1897, the city of Westport was and since that date has been consolidated with the city of Kansas City, Missouri.

Defendant admits that the tax bills described in the bill of complaint and in question in this suit were issued under and conformable to the laws of the State of Missouri, governing cities of the fourth class, but denies that the laws of Missouri governing cities of the fourth class violate section 53 of article IV or section 7 of article IX of the constitution of the State of Missouri,

This defendant denies that previous to the construction of the asphalt pavement on Main street, Baltimore avenue and Wyandotte street, in the city of Westport, described in the bill of complaint the portions of the said streets so improved had not been brought to the established grade thereof, but states that the portions of each of said streets upon which the said asphalt pavement was laid was graded to the established grade thereof before the proceedings which led up to the construction of the said pavements were inaugurated, and that said work of grading was at that time paid for in the manner provided by law; and denies that the cost of bringing each or any of said streets to the established grade thereof was by the board of aldermen of said city included in the special assessments referred to and complained of in the complainant's bill; and this defendant states that neither of the said streets, viz: Main street, Baltimore avenue and Wyandotte street, was ever graded to the estab-
42 lished grade by it; that no part of the assessments complained of in complainant's bill include any price or consideration of or for the grading of any of said streets to the established grade thereof.

This defendant denies that any extra work was done in connection with either of the contracts by virtue of which the special tax bills referred to in the bill of complaint were issued; and states that no dispute has arisen between the parties to the said contracts in regard to the amount or quantity of the several kinds of work done or to be paid for under the said contracts or in relation of the execution of the said contracts.

This defendant denies that the cost of the work done under any of the said contracts for the paving of Main street, Baltimore avenue and Wyandotte street, respectively, in the city of Westport, was not determined and apportioned by the board of aldermen of the said city; and this defendant states that the cost of the work done under each of the said three contracts was determined and apportioned, assessed and levied by the board of aldermen of the city of Westport in due form of law.

This defendant denies that sections 88 to 95 inclusive of the act of the General Assembly of the State of Missouri relating to cities of the fourth class, and referred to in the amendments to the bill of complaint, deprive complainant of his property without due process of law, or deny to the complainant the equal protection of the laws,

or take his property for private use, or that they violate section 1 of the fourteenth amendment to the Constitution of the United States; denies that the said laws are not general laws, and denies that said laws violate section 53 of article IV and section 7 of article IX of the constitution of the State of Missouri.

All of which matters and things this defendant is ready
43 and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence discharged with its reasonable costs and charges in this behalf most wrongfully sustained.

SCARRITT, GRIFFITH & JONES,
Solicitors for the Barber Asphalt Paving Company.

EDWARD L. SCARRITT, *Of Counsel.*

Thereafter, to-wit, on the 11th day of July, A. D. 1900, the following order was filed and entered of record in the above entitled cause:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

WEDNESDAY, *July 11th*, 1900.

RICHARD H. FIELD
against
BARBER ASPHALT PAVING COMPANY. } 2407.

Now on this day comes the complainant in his own proper person, and the defendant by its counsel, Scarritt, Griffith & Jones and the complainant asks leave to amend his bill of complaint herein by supplemental averment, which leave is by the court granted; and leave is given to the defendant to make answer thereto on or before the first day of August next; and the time for taking depositions herein in respect to the issues raised by said amendment is extended so that the complainant shall complete the taking of any such depositions on his part by the 15th day of August next, and further depositions on behalf of defendant shall be completed by the 15th day of September next, and if any depositions in rebuttal are desired to be taken on behalf of complainant the same shall be completed on or before the 25th day of September next. There-
44 upon this case shall stand at issue and ready for trial herein.

(Signed) JNO. F. PHILIPS, *Judge.*

Thereafter, to wit, on the 13th day of July, 1900, complainant filed an amendment to the tenth charge of his said bill, which amendment is in words and figures as follows:—

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant.

Amendment to Charge "Tenth" of Complainant's Bill.

Now comes the above named complainant, and by leave of court granted July 12th, 1900, amends charge "tenth" of his bill filed in the above cause, by adding thereto the following allegations

That the defendant, the city engineer, the board of aldermen and mayor of said city of Westport, conspiring, combining and contracting in restraint of trade and commerce among the several States and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri, caused to be specified in the resolutions and ordinances of said city and contracts for the paving in question, that it should consist of a genuine Trinidad Lake asphalt, thereby meaning and intending the asphalt produced and existing in Trinidad lake, of the island of Trinidad, without the United States and within the domain of another nation, and the defendant, at and before the dates alleged in this bill, monopolized and at-
45 tempted to monopolize, combined and conspired with said city authorities and other persons unknown to complainant, to monopolize the trade and commerce among the several States as to the importation, sale and use of Trinidad Lake asphalt, whereby it had, and attempted to have, at the times here in question, the exclusive control of the importation, the sale and use of said asphalt in and to the city of Westport and Kansas City, Missouri, so that when the defendant induced and persuaded the city authorities of said city of Westport to specify genuine Trinidad Lake asphalt, in its resolutions, ordinances and contracts for the pavements in question, it had monopolized and attempted to monopolize a part of the trade and commerce of the several States and with foreign nations, all in violation of the act of Congress contained in the act of July 2nd, 1890 "to protect trade and commerce against unlawful restraints and monopolies," and the said resolutions and ordinances of the said city of Westport also violate the commerce clause of section 8 of article I of the Constitution of the United States.

RICHARD H. FIELD, *Complainant.*

Thereafter, to-wit, on Friday, the 10th day of October, A. D. 1902, the same being a day of the regular April term of said court, the following decree was filed and entered of record in the above entitled cause:—

46 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING CO., Defendant. } No. 2407. In Equity.

Decree.

This case having heretofore been fully tried and heard on the pleadings and evidence, and having been argued both orally and in writing. And the trial judge having heretofore filed herein his views of the case to which reference is made. And now at this time, the case comes on for final decree, the court being fully advised in the premises doth find, order, adjudge and decree:

Up to and for a great many years prior to December 2, 1897, Westport, in Jackson county, in the State of Missouri, was a city of the fourth class under the laws of said State, having all the powers, and none other, of a city of said class, as conferred by the constitution and laws of said State. That by an election held on the date aforesaid the city of Westport, as a separate municipality ceased to exist, and upon due proceedings had and taken, the territory of said Westport, became a part of the city of Kansas City, Missouri.

From north to south, a block apart, in said city of Westport, were three streets by the names of Main, Baltimore and Wyandotte streets, abutting on which complainant owned lots, or parcels of ground. And on due proceedings had and taken in conformity to law, excepting as hereinafter recited, the municipal authorities of said Westport, while it was still a city, ordered the said three streets paved with asphalt, and the expense thereof assessed against
47 the abutting property, the defendant company having the contract therefor, and making and putting in said pavements, and for which paving, tax certificates were issued in favor of the defendant company all of which was during the time of the existence of said municipal corporation of Westport, and for the proportionate part of said paving, certificates were issued against the property of complainant, and property, in which he had an interest, abutting on said three streets, all of which said property is more particularly described in the bill in equity filed in this case to which reference is made.

And the court doth order, adjudge and decree, that as to all of said paving, on Main and Baltimore streets, the certificates issued therefor, as set forth in the bill in equity herein, are held and adjudged to be valid and binding, and the certificates issued on account of the said paving of said two streets, Main and Baltimore, are decreed to be valid and binding on complainant, and his said property, and that in which he has an interest, in so far, and to the ex-

tent that said lots are abutting on either of the streets of Main and Baltimore, and those two streets only.

And the court doth find, order, adjudge and decree, that neither the complainant nor his lots of land described in his bill in equity herein, as charged with the special tax bills, hereinbefore called tax certificates, for said Wyandotte Street pavement, to-wit, lots three (3) and four (4) in block forty-one (41), and lot one (1) in block forty-nine (49), and all other property and lands facing or abutting on Wyandotte street, all in Hyde Park in said late city of Westport, Missouri, and particularly all property and lots facing on said
48 Wyandotte street between Thirty-eighth street and Thirty-ninth street, all in Hyde Park, in said late city of Westport, Missouri, is in any way liable or chargeable for the work done by the defendant company in said Wyandotte Street pavement aforesaid.

That the said Wyandotte Street special tax bills and certificates aforesaid are void, and were void when issued to the defendant in payment for said Wyandotte Street pavement aforesaid, for the reason that the prior proceedings taken by the city authorities of the city of Westport, in the year 1897, upon which the work was done and said tax bills were issued, to-wit: the resolution No. 590 of the board of aldermen of said city of Westport declaring the work of paving Wyandotte street necessary to be done from the south line of Hunter avenue to the north line of Westport avenue, in said city adopted July 15th, 1897; also the ordinance No. 1931 of said city, entitled, "An ordinance to pave Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue," approved September 3, 1897; also the contract between said City of Westport and the defendant for said street pavement made under and pursuant to said proceedings; also the ordinance No. 1949 of the said city confirming the contract for said street pavement; also ordinance No. 2047 of said city, levying special tax and assessments and ordering special tax bills for said Wyandotte Street pavement, and each of them are void and were void *ab initio*.

It is further considered, adjudged and decreed by the court that the defendant and its agents are hereby perpetually enjoined and restrained from transferring the said Wyandotte Street special tax bills aforesaid, or any of them issued against the property of complainant aforesaid, for the Wyandotte Street pavement aforesaid; also from bringing or prosecuting any action upon any of
49 said special tax bills aforesaid in any other court, and that the defendant within sixty days bring the special tax bills aforesaid into this court and here cancel and remove the same as claims and clouds against the real estate aforesaid.

It is further considered, ordered and decreed by the court that the complainant have and recover no relief as to the Main Street and Baltimore Avenue special tax bills aforesaid, and that the complainant's bill filed herein as to the Main Street and Baltimore Avenue special tax bills described therein, be and the same is hereby dismissed.

It is further ordered and adjudged, that the motions filed by the complainant to exclude and strike out part of the depositions of J. K. Griffith and G. L. Love, and, all of the depositions of E. H. Phelps, W. S. Woods, E. R. Crutcher, A. D. Beedle, Charles E. Finlay and G. L. Carney, came on to be heard and considered at the hearing of this case, and which motions, and each of them are by the court overruled.

And it is ordered by the court that that part of the deposition- of J. K. Griffith and George L. Love referred to in said motions, and all of the depositions of E. H. Phelps, W. S. Woods, E. R. Crutcher, A. D. Beedle, Charles E. Finlay and G. L. Carney, be and the same is not excluded and not stricken out of this case, but all of which are, and still remain part of the evidence and record of the case.

It is further ordered and decreed, that one half of the costs be taxed against and paid by the complainant herein, and that one half of the costs be taxed against and paid by the defendant herein and that no solicitors' fees be taxed.

To all of which each party excepts in so far as this decree or any part thereof, is adverse to such party.

Done at Kansas City, Missouri, October 10, 1902.

(Signed) SMITH McPHERSON,
Trial Judge.

Thereafter, to-wit on the 18th day of December, 1902, complainant filed assignment of errors and petition for appeal in the above entitled cause.

Said assignment of errors is in words and figures as follows:—

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
BARBER ASPHALT PAVING COMPANY, Defendant. } No. 2407. In Equity.

Complainant's Assignment of Errors.

Comes now Richard H. Field, complainant in the above cause and makes and files the following assignment of errors to and upon the decision, judgment and decree made by this honorable court in the above cause on the 10th day of October, 1902;

1. The court erred in adjudging and decreeing valid and binding on complainant and his property the certificates, (special tax bills,) issued to defendant for the paving of Main street in question for the reasons hereinafter assigned and stated against the validity thereof.

2. The court erred in adjudging and decreeing valid and binding on complainant and his property the certificates, (special tax bills,)

issued to the defendant for the paving of Baltimore avenue,
51 in question, for the reasons hereinafter assigned and stated against the validity thereof.

3. The court erred in ordering and decreeing that the complainant have and recover no relief as to the Main Street special tax bills described in his bill filed in this cause, for the reasons hereinafter assigned and stated against the validity thereof.

4. The court erred in ordering and decreeing that the complainant have and recover no relief as to the Baltimore Avenue special tax bills described in his bill filed in this cause for the reasons hereinafter assigned, and stated against the validity thereof.

5. The court erred in ordering and decreeing that the complainant's bill be dismissed as to the Main Street special tax bills described in his bill filed in this cause for the reasons hereinafter assigned and stated against the validity thereof.

6. The court erred in ordering and decreeing that the complainant's bill be dismissed as to the Baltimore Avenue special tax bills described in his bill filed in this cause, for the reasons hereinafter assigned and stated against the validity thereof.

7. The court erred in holding that sections 88 to 95 inclusive, of the act of the General Assembly of the State of Missouri, entitled "An act to repeal article five (5) of chapter thirty (30) of the Revised Statutes of Missouri of 1889, and certain amendments thereto; said article five (5) being entitled 'Cities of the fourth class,' and to enact in lieu thereof a new article, providing for the government of cities of the fourth class," approved April 11th, 1895, did not violate section 1 of the 14th amendment to the Constitution of the United States.

8. The court erred in not adjudging and decreeing void and
52 in not cancelling, the special tax bills in question for the Main Street and Baltimore Avenue paving, because the said sections 88 to 95 inclusive of the State legislative act aforesaid violated section 1 of the 14th amendment to the Constitution of the United States.

9. The court erred in not adjudging and decreeing void the special tax bills in question for the Main Street and Baltimore — pavements, when, the board of aldermen of the city of Westport, Missouri, in declaring the work on each of these streets necessary to be done, in ordering it done, and in contracting with the defendant therefor, in the manner hereinafter noted, deprived the complainant of his rights of property guaranteed in section 1 of the 14th amendment to the Constitution of the United States.

10. The court erred in not adjudging and decreeing void the special tax bills described in the "fifth" charge of complainant's bill as issued to defendant against lots one (1) to five (5) inclusive, in block No. 45, for the asphalt pavement in question, on Main street, when the uncontradicted testimony shows that preceding this pavement, to-wit, in 1891 or 1892, the city of Westport macadamized that part of said Main street from 39th street to Westport avenue, and assessed the cost thereof to the said lots in said block No. 45, and

other lands abutting on that part of said Main street, and when the uncontradicted testimony further shows that in 1897, when the asphalt pavement in question on Main street from 31st street to Westport avenue was ordered laid and contracted for, the said macadam pavement in that block of Main street, to-wit: from 39th street to Westport avenue was a good and substantial pavement, and in no need of repair, or of being replaced by another pavement, for the public use or for safe and convenient travel thereon, unlike
53 the other part of the said Main street, to-wit, from 39th street to 31st street, which was then out of repair and which had not been paved or macadamized, at the cost of the lands abutting thereon, before the asphalt pavement in question laid thereon by defendant in 1897.

11. The court erred in not adjudging and decreeing void the special tax bills in question issued to defendant for the paving in question, on Main street, when, as alleged by complainant and shown by the uncontradicted proofs in the cause, said pavement was not done nor declared necessary to be done by the board of aldermen of the city of Westport because deemed by said board necessary to be done, but because of the lobbying and undue influence of the defendant's agents with said board of aldermen and with the residents of said city owning lands fronting on that part of Main street.

12. The court erred in not adjudging and decreeing void the special tax bills in question issued to defendant for the paving in question on Baltimore avenue, when, as alleged by complainant and shown by the uncontradicted proofs in the cause, said paving was not done nor declared necessary to be done by the board of aldermen of the city of Westport because deemed by said board necessary to be done, but because of the lobbying and undue influence of the defendant's agents with the said board of aldermen and with the residents of said city owning lands fronting on that part of Baltimore avenue.

13. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Main street when the uncontradicted proof in the cause shows that the board of aldermen of the city of Westport, Missouri, did not declare the work on said Main street necessary to be done, nor afterwards pass the ordinance ordering such work to be done, nor
54 contract with the defendant therefor, because the said work was deemed by said board necessary to be done, but did so because of the previous uniform custom and course of dealing with the defendant, that the said board of alderman would and did declare it necessary to pave and order paved any street in said city with "a genuine Trinidad Lake asphalt" whenever the agents of defendant procured and presented to said board a petition signed by a majority of the residents of said Westport owning lands fronting on the proposed street pavement, asking said board to do so.

14. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Baltimore avenue, when the uncontradicted proof in the cause

shows, that the board of aldermen of the city of Westport, Missouri, did not declare the work on said Baltimore avenue necessary to be done, nor afterwards pass the ordinance ordering such work to be done, nor contract with the defendant therefor, because the said work was deemed by said board necessary to be done, but, did so because of the previous uniform custom and course of dealing with the defendant, that the said board of aldermen would and did declare it necessary to pave and order paved any street in said city with "a genuine Trinidad Lake asphalt," whenever the agents of defendant procured and presented to said board a petition signed by a majority of the residents of said Westport owning lands fronting on the proposed street pavement, asking said board to do so.

15. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Main street and for the paving done on Baltimore avenue when complainant's bill alleges and the proof in the cause shows, that the defendant had the exclusive control of the importation, sale
55 and use of the "Trinidad Lake asphalt" in and to said city of Westport, at the times of the specifications of the same by the city of Westport, Missouri, for use in the said street improvements.

16. The court erred in not adjudging and decreeing void the special tax bills in question issued to defendant for the paving done on Main street because the written contract therefor, between the City of Westport and the defendant required that the asphalt used in said street pavement should be "refined Trinidad Lake asphaltum," and excluded the asphalt of other foreign countries and the asphalt of our own States from the market for use, and from being used, in said street pavement, in restraint of trade and commerce among the several States and with foreign nations, contrary to section 1 of the act of Congress of the United States, approved July 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

17. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving on Baltimore avenue, because the written contract therefor between the City of Westport and the defendant required that the asphalt used in said street pavement should be "refined Trinidad Lake asphaltum" and excluded the asphalt of other foreign countries and the asphalt of our own States from the market for use, and from being used, in said street pavement, in restraint of trade and commerce among the several States and with foreign nations, contrary to section 1 of the act of Congress of the United States, approved July 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

18. The court erred in not adjudging and decreeing void
56 the special tax bills in question issued to defendant for the paving done on Main street, when the uncontradicted proof in the case shows that the resolution and ordinances of the board of aldermen of said city of Westport under which said work was done,

were in restraint of trade and commerce among the several States and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri, and violated section 1 and section 3 of the act of Congress of the United States, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," approved July 2nd, 1890.

19. The court erred in not adjudging and decreeing void the special tax bills in question issued to defendant for the paving done on Baltimore avenue, when the uncontradicted proof in the cause shows that the resolution and ordinances of the board of aldermen of said city of Westport under which said work was done, were in restraint of trade and commerce among the several States and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri, and violated section 1 and section 3 of the act of Congress of the United States entitled, "An act to protect trade and commerce against unlawful restraint and monopolies," approved July 2nd, 1890.

20. The court erred in not adjudging and decreeing void the special tax bills in question issued to defendant for the paving on Main street, when the proof in the cause shows, that the designation and specification in the resolution, ordinances and contract that the asphalt used in said Main Street pavement should be "genuine Trinidad Lake asphalt," was due to a conspiracy and combination between the defendant, the city engineer, and board of alder-
57 men of said city of Westport and others, in restraint of trade and commerce among the several States and with foreign nations, and in restraint of trade and commerce with the Indian Territory of the United States and the State of Missouri, contrary to section 1 and section 3 of the act of Congress of the United States entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2nd, 1890.

21. The court erred in not adjudging and decreeing void the special tax bills in question issued to defendant for the paving on Baltimore avenue when the proof in the cause shows that the designation and specification in the resolution, ordinances and contract that the asphalt used in said Baltimore Avenue pavement should be "genuine Trinidad Lake asphalt," was due to a conspiracy and combination between the defendant, the city engineer and board of aldermen of said city of Westport and others, in restraint of trade and commerce among the several States, and with foreign nations and in restraint of trade and commerce with the Indian Territory of the United States and the State of Missouri, contrary to section 1 and section 3 of the act of Congress of the United States, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" approved July 2nd, 1890.

22. The court erred in not adjudging and decreeing void the special taxbills in question issued to defendant for the paving done on Main street, when the uncontradicted proof shows that the defendant obtained the contract for said street pavement by monop-

olizing, by attempting to monopolize, by conspiring and combining with other persons to monopolize the importation and the sale and use of Trinidad Lake asphalt in the city of Westport, Missouri, all in violation of section 2 of the act of Congress of July 2nd, 1890, aforesaid.

23. The court erred in not adjudging and decreeing void
58 the special tax bills in question issued to defendant for the paving done on Baltimore avenue when the uncontradicted proof shows that the defendant obtained the contract for said street pavement by monopolizing, by attempting to monopolize, by conspiring and by combining with other persons to monopolize the importation and the sale and use of Trinidad Lake asphalt in the city of Westport, Missouri, all in violation of section 2 of the act of Congress of July 2nd, 1890, aforesaid.

24. The court erred in not adjudging and decreeing void the special tax bills for the Main Street pavement in question, when the resolution No. 540 of the board of aldermen of the city of Westport, declaring said street pavement to be necessary, provided that the pavement should consist of "a genuine Trinidad Lake asphalt pavement," and excluded from the market for use, and from being ordered or allowed to be used, in said street pavement the asphalt of other foreign countries, and of the United States and violated the commerce clause in section 8 of article I of the Constitution of the United States.

25. The court erred in not adjudging and decreeing void the special tax bills for the Baltimore Avenue pavement in question when the resolution No. 570 of the board of aldermen of the city of Westport declaring said street pavement to be necessary, provided that the pavement should consist of "a genuine Trinidad Lake asphalt pavement," and excluded from the market for use, and from being ordered or allowed to be used, in said street pavement, the asphalt of other foreign countries and of the United States and violated the commerce clause of section 8, article I of the Constitution of the United States.

26. The court erred in not adjudging and decreeing void the special tax bills for the Main Street pavement in question,
59 when the ordinance No. 1803 of the board of aldermen of the city of Westport, ordering said street pavement, provided that the pavement should consist of "a genuine Trinidad Lake asphalt," and excluded from the market and from being contracted for use, and from being used, in said street pavement, the asphalt of other foreign countries and of the United States and violated the commerce clause in section 8 of article I of the Constitution of the United States.

27. The court erred in not adjudging and decreeing void, the special tax bills for the Baltimore Avenue pavement in question, when the ordinance No. 1866 of the board of aldermen of the city of Westport ordering said street pavement, provided that the pavement should consist of "a genuine Trinidad Lake asphalt pavement," and excluded from the market and from being contracted for use, and

from being used, in said street pavement, the asphalt of other foreign countries and of the United States, and violated the commerce clause in section 8, of article I of the Constitution of the United States.

Wherefore the complainant asks a reversal of the judgment and decree aforesaid.

R. H. FIELD,
Solicitor for Complainant.

Complainant's petition for appeal, filed as aforesaid on December 18, 1902, is in words and figures as follows:—

60 In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

Hon. John F. Philips, Judge of said Court.

RICHARD H. FIELD, Complainant,
vs.
BARBER ASPHALT PAVING COMPANY, Defendant. } No. 2407. In Equity.

Petition for Appeal.

Richard H. Field, the complainant in the above cause, conceiving himself aggrieved by the decree of the court entered in the above cause on the 10th day of October, 1902, wherein and whereby the court adjudged the certificates, (special tax bills), issued to defendant against complainant's property for the paving of Main Street and Baltimore avenue, described and complained of in the bill filed in this cause were valid and binding upon complainant and his property, also wherein and whereby the court ordered and decreed that the complainant have and recover no relief as to the Main Street and Baltimore Avenue special tax bills aforesaid and that the complainant's bill filed herein as to the Main Street and Baltimore Avenue special tax bills described therein be and was thereby dismissed, and wherein and whereby it was ordered that one half of the costs herein be taxed against and paid by the complainant herein, does hereby appeal from the said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors herewith filed, and he prays that this appeal may be allowed and further prays that an order be made fixing the amount of security which the said complainant shall give and furnish on said appeal, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the final determination of said appeal by the said Supreme Court of the United States, and your petitioner herewith presents and files his assignment of
61 errors to the judgment and decree aforesaid.

RICHARD H. FIELD,
Complainant.

On the same day, to-wit, on the 18th day of December, 1902, defendant also filed assignment of errors and petition for appeal in the above entitled cause.

Said assignment of errors filed by defendant is in words and figures as follows, to-wit:—

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
BARBER ASPHALT PAVING COMPANY, Defendant. } No. 2407. In Equity.

Defendant's Assignment of Errors.

I.

Now comes defendant The Barber Asphalt Paving Company, by its solicitors, and says that the decree heretofore rendered and entered in said cause, in so far as it adjudged and decrees that the resolution of the board of aldermen, the ordinance of the city of Westport and the contract between said city and the defendant, for paving Wyandotte street in said city, and the special tax bills described in complainant's bill as having been issued and held by the defendant for the paving of Wyandotte street in said city are null and void, is erroneous and against the just rights of the defendant for the following reasons:

First. Because the issue upon which the learned trial court determined the said resolution, ordinance, contract and special tax bills were void, namely: that because the street was mac-
62 adamized in 1892, its repavement with asphalt in the fall of 1897 was unnecessary, is not one raised by the pleadings, nor was that issue tried or submitted to the court. It is not charged in the bill of complaint that there was any old macadam upon Wyandotte street along the distance improved at the time the asphalt pavement was laid, nor that by reason of that fact or the condition of such macadam the repavement of said street was unnecessary or the taxation of complainant's land therefor confiscatory.

Second. Because there is nothing in the voluminous bill of complaint or the testimony taken in his behalf to indicate that complainant put any reliance upon the fact that the improvement of the street by paving it with asphalt was unnecessary or unreasonable because of the fact that it had been macadamized years before, or because the macadam then upon the street was inadequate for the purposes of a street pavement at the time the asphalt pavement was laid, or that it would endure for years in the future and the defendant was under no obligation to, and did not introduce any testimony upon that issue.

Third. Because the learned trial court in determining that the work provided for in the resolution, ordinance and contract for the repavement of Wyandotte street, with asphalt in the fall of 1897 was unnecessary and unreasonable, overlooked and failed to give due weight to the undisputed facts, (1) that the asphalt pavement was laid in the fall of 1897, and was guaranteed to remain in perfect repair for a period of five years after its completion, thereby insuring to the complainant and the public a modern and thoroughly good pavement for a long period of years after its construction; (2) that a majority of the resident owners of lots abutting on said street petitioned the city officials to have the street paved at the time and in the manner ordered by those offi-
63 cials, although the construction of the improvement as petitioned for imposed the obligation upon such petitioners to pay the same relative proportion of the cost of the entire work that complainant was required to pay; (3) that the receiver of this court in Mastin *vs.* Mastin under the order of this court, signed the petition for such work, and thereby expressed the favorable judgment of this court upon such improvement; (4) that all the members of the board of aldermen and the mayor concurred in ordering this improvement; (5) that no property owner along the entire street although due notice by publication had been given of the intention to improve it at the expense of the abutting property owners, protested or attempted to protest against the improvement; (6) that an adequate allowance was made in the price of the asphalt pavement for the value of the old macadam then in place; (7) that the complainant's lands were enhanced in value by reason of this improvement to the extent of at least ten dollars per foot, and that the number and character of dwellings built upon this street along its entire extent by reason of the asphalt pavement establishes the good judgment of the petitioners for the pavement and of the city officials in ordering it laid, and the remarkable developing capacity of a modern street pavement.

Fourth. Because the evidence showed that the pav*ement* of said Wyandotte street in the fall of 1897 with an asphalt pavement was not unreasonable or confiscatory, but enhanced the value of complainant's property and all property charged with the payment of the cost of such pavement to the extent of ten dollars per front foot and to an amount largely in excess of the cost of the improvement.

Fifth. Because the determining of the time when a street shall be paved and the character and extent of the improvement is
64 within the legislative and discretionary power of the mayor and board of aldermen of the city of Westport, and it is without the province of courts to interfere with the exercise of the power of taxation by a municipality to pay for such improvements in the absence of a clear showing that the collection of such a tax amounts to confiscation of the subject of taxation.

Sixth. Because the court erred in adjudging and decreeing that the resolution and ordinance of the city of Westport for the paving of Wyandotte street in the city of Westport, and the contract be-

tween the defendant and said city for the construction of that pavement, and the special tax bills issued by the said city to the defendant to pay for said work are and were void *ab initio*.

Seventh. Because the court erred upon the record in this case in adjudging and decreeing that the special tax bills described in the bill of complaint, and issued and received by the defendant as compensation for the asphalt pavement laid upon Wyandotte street in said city are void, and that the complainant was entitled to the relief prayed for in respect to those special tax bills.

Eighth. Because the price of the work of paving Wyandotte street is $31,908, which price was, by the contract between defendant and the City of Westport, stipulated to be paid only by the issuance of special tax bills evidencing special assessments against the property abutting upon and benefitted by said improvement; that under the laws of Missouri defendant has no other resource for collecting the price of such work than by the enforcement of such special assessments in the manner provided by law, and that to adjudge such special assessments void is to deprive the defendant of all compensation for its labor and material expended upon said street, and to permit the complainant and other property owners charged
65 with the cost of such work to receive the benefit and enjoyment of said improvement without cost, and contrary to equity and good conscience.

II.

The defendant says that the decree heretofore rendered and entered in said cause in so far as it adjudges and decrees that the said circuit court had jurisdiction of this suit, and that the amount in dispute is not less than two thousand dollars, is erroneous, and against the just rights of the defendant.

Wherefore, the defendant prays that said decree be reversed and that said court be directed to dismiss said bill of complaint or to enter a decree denying complainant any relief upon his said bill of complaint.

W. C. SCARRITT,
J. K. GRIFFITH,
E. H. JONES,
Solicitors.

E. L. SCARRITT, *Of Counsel.*

Said petition of defendant for appeal, so filed as aforesaid on the 18th day of December, 1902, is in words and figures as follows, to-wit:—

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
BARBER ASPHALT PAVING COMPANY, Defendant. } No. 2407. In Equity.

Petition of Defendant for Appeal.

The above named defendant, conceiving itself aggrieved by the order and decree made and entered in the above entitled cause
66 on October 10th, 1902, wherein and whereby it was ordered, adjudged and decreed that the circuit court had jurisdiction of this cause and that the amount involved did exceed two thousand dollars and that certain special tax biils and assessments owned and held by the defendant and described in the decree, issued by the City of Westport for paving Wyandotte street, were void, does hereby appeal from the said order and decree of the date aforesaid, to the United States Supreme Court, for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon which the said order and decree were made duly authenticated, may be sent to the United States Supreme Court.

W. C. SCARRITT,
J. K. GRIFFITH,
E. H. JONES,
Solicitors for Defendant.

E. L. SCARRITT, *Of Counsel.*

Thereupon, on the same day, to-wit, on the 18th day of December 1902, the same being a day of the November term of said court, the following order was filed and entered of record in the above entitled cause:—

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

R. H. FIELD, Complainant,
vs.
BARBER ASPHALT PAVING COMPANY, Defendant. } No. 2407. In Equity.

Order Allowing Appeals.

Now on this 18th day of December, A. D. 1902, come the
67 complainant R. H. Field, in person, and the defendant, Barber Asphalt Paving Company, by E. L. and W. C. Scarritt,

J. K. Griffith and E. H. Jones, its solicitors in the above cause and the following proceedings take place in the presence of each other:

Complainant, R. H. Field, presents and files his petition for an order of the court allowing him an appeal from the judgment and decree of the court entered in the above cause on October 10, 1902, and also files with the clerk of this court and with his said petition for appeal, his assignment of errors to and upon said judgment and decree. Wherefore it is ordered by the court that the complainant be and is hereby allowed as prayed, an appeal to the Supreme Court of the United States from the judgment and decree aforesaid. It is further ordered that the bond of said appeal be and is fixed at the sum of twenty-five hundred dollars ($2500.00), the same to act as a supersedeas bond and also as a bond for costs, and damages on appeal, and the complainant now files such appeal bond with himself as principal and Annie C. Field and Annie Maxey Field as sureties, which appeal bond is hereby approved.

The defendant, Barber Asphalt Paving Company, by its said solicitors, presents and files its petition for an order of the court allowing it a cross appeal from the judgment and decree of the court entered in the above entitled cause on October 10, 1902, and also files with the clerk of this court and with its said petition for appeal its assignment of errors to and upon said judgment and decree. Wherefore it is ordered by the court that the defendant, Barber Asphalt Paving Company, be and is hereby allowed on the issues stated in its assignment of errors as prayed, an appeal to the Supreme Court of the United States from the judgment and decree aforesaid.

68 It is further ordered that the bond for said appeal be and is fixed at the sum of twenty-five hundred dollars ($2500.00) the same to act as a supersedeas bond and also as a bond for costs and damages on appeal, and the defendant now files such appeal bond with itself as principal, and James B. McGowan and A. M. Peck as sureties, which appeal bond is hereby approved.

(Signed) JNO. F. PHILIPS, *Judge.*

69 Said bond of complainant for appeal is in words and figures as follows:—

UNITED STATES OF AMERICA, *set:*

Know all men by these presents that we, Richard H. Field, as principal, and Annie C. Field and Annie M. Field, as sureties, are held and firmly bound unto the Barber Asphalt Paving Co. in the sum of twenty-five hundred dollars to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of December, A. D. 1902.

Upon this express condition, to-wit: Whereas, the above named Richard H. Field, has taken an appeal to the Supreme Court of the United States to reverse the judgment rendered against him by the

circuit court of the United States for the western division of the western district of Missouri in the cause in equity in said court No. 2407, entitled Richard H. Field complainant, *vs.* Barber Asphalt Paving Company, defendant; now if the above named Richard H. Field shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

RICHARD H. FIELD. [SEAL.]
ANNIE C. FIELD. [SEAL.]
ANNIE M. FIELD. [SEAL.]

Signed and sealed in the presence of—
—— ——.

The above bond is hereby approved and ordered to be filed and made a part of the record.
(Signed) JNO. F. PHILIPS, *Judge.*

O. K.
W. C. S.

70 Defendant's appeal bond is in words and figures as follows:

UNITED STATES OF AMERICA, *sct:*

Know all men by these presents, that we, Barber Asphalt Paving Company, as principal, and J. B. McGowan and A. M. Peck, as sureties, are held and firmly bound unto Richard H. Field in the sum of twenty-five hundred (2500) dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 10th day of November, A. D. 1902.

Upon this express condition to-wit: Whereas, the above named Barber Asphalt Paving Company has taken an appeal to the Supreme Court of the United States to reverse the judgment and decree entered October 10, 1902, by the circuit court of the United States for the western division of the western district of Missouri, in the cause in equity No. 2407 entitled Richard H. Field *vs.* Barber Asphalt Paving Company, in said court. Now if the above named Barber Asphalt Paving Company shall prosecute its said appeal to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

BARBER ASPHALT PAVING COMPANY,
By SCARRITT, GRIFFITH & JONES,
Its Attorneys. [SEAL.]

J. B. McGOWAN. [SEAL.]
A. M. PECK. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.

(Signed) JNO. F. PHILIPS, *Judge.*

O. K.
R. H. FIELD.

71 The following evidence was introduced on the part of the complainant and defendant, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant.

Depositions.

UNITED STATES OF AMERICA,
State of Missouri, County of Jackson, } ss:

Depositions of witnesses produced, sworn, and examined on the 14th, 15th days of February, 1900, and the 17th, 23d, and 24th days of March, 1900, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of said days, at the law office of R. H. Field, 1020 New York Life building, Kansas City, Jackson county, State of Missouri, before me, Alfred Fidler, a notary public within and for Jackson county, Missouri, in a certain cause now pending in the circuit court of the United States for the western division of the western district of Missouri, at Kansas City, between Richard H. Field, complainant, and The Barber Asphalt Paving Company, defendant, on the part of the complainant.

Appearances.

Mr. R. H. Field, the complainant, appeared personally and by his attorney Mr. Wash Adams.

Messrs. Scarritt, Griffith & Jones appeared for the defendant.

At this point it was agreed by and between counsel for the parties complainant and defendant to this action that these depositions be taken in shorthand by Alfred Fidler and be by him transcribed on the typewriter and when thus transcribed that they be subscribed by the respective witnesses and when thus subscribed that they be of the same force and effect as if they had been taken in longhand and subscribed by the respective witnesses immediately after the taking of the same.

And the said witnesses each one of them being of lawful age and having been by me first cautioned and sworn to tell the truth the

whole truth and nothing but the truth, in the matter in controversy aforesaid, I did with assistance of counsel, carefully examine the said witnesses and they did thereupon depose and say, respectively, as follows:

72 It is stipulated between the parties to this cause that the complainant shall have until the 25th day of March, 1900, to take testimony in support of his bill, and that the defendant shall have until the 1st day of May, 1900, to take testimony on its part, and that thereafter the complainant shall have until May 9th, 1900, to take testimony in rebuttal.

RICHARD H. FIELD, *Complainant.*
SCARRITT, GRIFFITH & JONES,
Attorneys for the Defendant.

J. K. GRIFFITH, of lawful age, being produced, sworn and examined on the part of the complainant, deposeth and saith as follows:

Direct examination by Mr. FIELD:

Q. You are a member of the firm of Scarritt, Griffith & Jones?
A. Yes sir.
Q. You are one of the solicitors for the defendant in this case?
A. Yes sir.
Q. Were you a member of that firm during the year 1897?
A. Yes, I was a member of the firm of Scarritt, Griffith & Jones—it didn't consist entirely of the same members at that time.
Q. As it does now you mean?
A. Yes.
Q. Was your firm in and during the year 1897 attorneys and counsellors for the Barber Asphalt Paving Company?
A. Yes sir.
Q. And before that time?
A. Yes sir,—attorneys in Kansas City you mean?
Q. Yes, are you the regular attorneys and counsellors?
A. Yes sir.
Q. How long has the defendant been engaged in street paving in Kansas City and the vicinity?
A. I think about ten or twelve years, possibly a little longer.

Q. What particular brand or brands of asphalt does it use
73 and has it used since it has been in the business here of street paving?

By Mr. SCARRITT: Is he an expert?
By Mr. FIELD: I am asking for general information now.

A. I understand they lay the best, Trinidad Lake asphalt.
Q. Has that been exclusively the brand of asphalt defendant has used in the last ten years here and in the vicinity?
A. I really cannot say. We have not been attorneys for them during all that time.

Q. Well how long have you been attorneys?

A. I do not remember just when we did start in. Mr. Scarritt can tell you that. It was before I was a member of the firm.

Q. You were in the office during that time?

A. Yes.

Q. Well to your knowledge how long have they been engaged in using this Trinidad Lake asphalt?

A. Ever since Mr. Scarritt has been attorney for them.

Q. Well that does not give me any time?

A. Well I do not remember the time they became attorneys.

Q. Well about how many years ago?

A. About ten years.

Q. Have they used any other brand of asphalt in street paving in Kansas City and vicinity in that time?

A. If they have I do not know it.

Q. Who else during that time has used that brand of asphalt in Kansas City and vicinity for street paving?

A. I do not know.

Q. Anyone else that you know of?

A. No sir.

Q. Where is this Trinidad Lake asphalt,——

A. Oh,——

Q. What were you going to say?

A. Oh, I understand that McCormick or Parker-Washington Company laid Trinidad Lake.

Q. Was this Parker-Washington Company the only competitor that the Barber Asphalt Paving Company has had or been pretending to have in the last ten years?

74 A. Well the Rock Creek Company.

Q. Trinidad Lake asphalt?

A. I think there have been other parties here, who bid on Trinidad Lake. I do not remember whether they were private parties or who they were.

Q. You cannot give the names?

A. No sir.

Q. Do you believe anybody else during the last ten years has been able to furnish Trinidad Lake asphalt?

A. The Parker-Washington Company pretended to have.

Q. Do you believe that they have?

Counsel for the defendant objects to the question as calling for a conclusion and not for the facts and therefore incompetent.

A. Why I have no reason to disbelieve it. I do not know. I know that they got one street here under Trinidad Lake specifications and laid it and the city accepted it.

Q. I will ask you if at the time the Parker-Washington Company and others have put in bids here pretending to bid on Trinidad Lake asphalt, if the Barber Company has not contested that matter with them on the ground that they could not furnish Trinidad Lake asphalt?

Counsel for defendant objects to the question as calling for the conclusion of the witness and not for the fact, and as irrelevant.

A. Well I remember that they claimed that the Parker-Washington Company could not comply with the specifications.
Q. Could not furnish Trinidad Lake asphalt?
A. That was one of the specifications.
Q. Well wasn't that one of the grounds, that they could not furnish Trinidad Lake asphalt?
A. I believe that was one of the grounds.
Q. And don't you remember that the Parker-Washington put in a bid for Tracy avenue from Ninth to 12th that called for Trinidad Lake asphalt that was under the bid of the Barber Company,
75 the defendant, and there was a contest in the supreme court and mandamus proceedings brought by the Parker-Washington?

Counsel for the defendant objects to the question as incompetent, irrelevant and immaterial.

Q. Don't you remember the Parker-Washington put in a bid?
A. Yes sir.
Q. Under the bid of the Barber?
A. Yes sir.
Q. And there was an issue raised there by the Barber to the letting of the work to the Parker Washington on the ground that they could not furnish Trinidad Lake asphalt?

Counsel for defendant objects to the question as calling for a conclusion and for secondary evidence on a matter having nothing to do with the issues in this case.

A. I do not think that is true Judge. My recollection about that is the contract was awarded to the Parker-Washington Company by the engineer and the public improvement committee, and the council refused to confirm the award and then they brought a mandamus suit to compel them to confirm it.
Q. Well getting away from that mandamus, when the Parker-Washington bid had been accepted by the engineer and public improvement committee of the common council, I will ask you if between that acceptance of the Parker-Washington bid for paving Tracy avenue at the point named and before the council objected to or refused to confirm the award to the Parker-Washington, if the defendant did not make an issue and claim before a committee of the council that the Parker-Washington could not furnish the Trinidad Lake asphalt?

Counsel for the defendant objects to the question as incompetent, irrelevant and immaterial.

A. Not that I know of Judge. I have no personal knowledge or recollection of that on Tracy avenue.

76 Q. Well the defendant afterwards got the contract for paving Tracy avenue at the point named and did the paving, didn't it?

Counsel for the defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes sir.

Q. Where does this Trinidad Lake asphalt come from?

A. I only know what I have heard about it Judge.

Q. You have heard of Europe too?

A. Yes sir, it is simply hearsay From Trinidad, I suppose.

Q. You know that from talk in asphalt circles, that is people who deal in it and it is a common well-known fact that this Trinidad Lake asphalt comes from the island of Trinidad?

A. Yes sir.

Q. Where is this island of Trinidad?

A. I do not want you to get me to expose my ignorance of geography. I think it is somewhere along the north coast of South America.

Q. It is nowhere in the United States?

A. No,—at least that is not my information.

Q. Do you know who the Barber Asphalt Company gets this Trinidad Lake asphalt from?

A. No, I do not.

Q. Have you ever seen the contract they have for the purchase and use of it?

A. No sir.

Q. Where is that contract?

A. I do not know that there is any contract. If there is I never saw it.

Q. Well don't you know, Mr. Griffith, that there is a contract that they have the sole and exclusive right to purchase the Trinidad Lake asphalt for this part of the country?

A. No, I do not. I think they have not.

Q. Well whose is the contract or who else can purchase it?

A. I do not know.

Q. Who is there connected with the Barber Asphalt Company in Kansas City that would know about that?

77 A. I do not know who would, but I can tell you who the superintendent is here.

Q. The superintendent here was not the superintendent in 1897?

A. No, I think not.

Q. Well this man Emerest, he was not here at all in 1897?

A. I do not think he was. I do not remember about the time.

Q. He was not here at all at the time of the paving in question?

A. I do not remember but I do not think he was. I would not be positive about it.

Q. Did you ever examine the resolutions, ordinances and contracts for the paving of Main street, Baltimore avenue and Wyandotte street in question?

A. Yes sir.
Q. Are you the member of the firm that examined these papers?
A. Yes, I examined those contracts.
Q. Ordinances and resolutions?
A. Yes sir.
Q. Well before the work was let by the City of Westport?
A. After it was let.
Q. Didn't you see them before it was let?
A. I examine the contract after it is let and all the proceedings leading up to it.
Q. I mean before they confirmed those contracts, the councilmen or board of aldermen, of Westport?
By Mr. SCARRITT: That is after it is let.

By Mr. FIELD:

Q. Do you mean you examine them before they are confirmed and awarded by the board of aldermen, or after it was awarded and confirmed?
A. After it was awarded and before it was confirmed.
Q. Awarded by whom?
A. After it was let by the engineer and public improvement committee I examined these contracts and ordinances, and before it is confirmed.
Q. Well before it is accepted and binding on the defendant and the City of Westport you examined these contracts and resolutions?
78 A. That is before the contract was confirmed by the board of aldermen.
Q. The course of procedure out there under that law of 1895 under which the City of Westport was acting as a city of the fourth class, the board of aldermen first pass a resolution declaring the work necessary, in which case the property owners, resident property owners, are supposed to have time for remonstarting against the improvements and then the council pass the ordinance in each case that the work be done?
A. After the time for protest expires.
Q. Then after that the engineer posted notice that the contract would be awarded?
A. It was also advertised in the Westport City paper.
Q. Then after that the contract is signed provisionally by the city engineer on behalf of the City of Westport and by the defendant, Barber Asphalt Company. Now then is that correct in the statement of the order of procedure?
A. I did not get the last. After what, the contract is signed?
Q. The contract to do the work in each case.
A. Well the bid is opened at the time the advertisement says and awarded and then the contract is confirmed by the board of alderman and the engineer signs it on behalf of the city and the company signs it.

Q. Well with the statement you have made I have stated it correctly haven't I?

A. Yes sir.

Q. I understand in the first place it is signed by the City of Westport by H. A. Abercrombe, and there is a provision in the contract in each case that it is executed subject to the approval of the council and after they approve it it becomes binding in each case? Have I stated it correctly?

A. I think so Judge, if I understand you correctly.

Q. Though signed by the city engineer the contract was not binding on the City of Westport under its terms until afterwards
79 approved by the board of aldermen?

A. Yes sir.

Q. Now when did you examine those papers, resolutions and ordinances? Was it after the award and before the city engineer signed it provisionally?

A. Before the contract was signed up.

Q. At the time you examined the ordinances, and resolutions the contracts had not been signed at all?

A. Yes sir.

Q. Now I will ask you if you have not seen the resolutions in one or more of those proceedings before they were passed by the council? Before they were passed?

A. Yes, I sometimes see them before they are passed.

Q. Didn't you see one of these three before they were passed?

A. Why I think so.

Q. Didn't you draw one of these three?

A. I prepared some of the resolutions and ordinances at the request of Mr. Abercrombe.

Q. At the request of Mr. Abercrombe or the Barber Asphalt Company?

A. At the request of Mr. Abercrombe.

Q. He referred the matter to you did he?

A. Well he had been in the habit of drawing them up and making mistakes and they had to go over them and correct them.

Q. Well what paving had your company the defendant done before these three pavements in question?

A. Well Warwick boulevard and I think Judge they paved several other streets before the law of 1895, but I do not remember what they were. Long Meadow was one of them.

Q. Well since the law of 1895 and these other pavements were made, what other street pavements have your company made?

A. Do you want me to name the streets that were paved subsequent to the law of 1895?

Q. Yes sir.

A. Well Main street.

Q. That is one in question.

80 A. Yes sir, and 32nd street, Wyandotte street and Baltimore avenue.

Q. I do not care for any that occurred since these pavements.

What I want to get at is any paving that you know of that were made under the law of 1895 that were made before these three pavements?

A. That is under the law of 1895?

Q. Yes.

A. Well there was Walnut street from 41st to 43d and 32nd street from Main to McGee and one or two more, I do not remember them now.

Q. Well which one of these pavements had a mistake or error occurred in the resolutions that had been drawn?

A. Well in Walnut street, as I named. My recollection is they made a mistake in everyone he started and we had to start the proceedings over again.

Q. They could not do it right at all out there then?

A. Well they usually made a great many errors.

Q. Then you drew the resolutions for each of these three pavements in question?

A. No, I am pretty sure I did not draw the resolution for Main street.

Q. That was the first one of the three in question?

A. Yes sir.

Q. Did you draw the resolution for Baltimore avenue?

A. I think I did.

Q. Did you draw the resolution for Wyandotte street?

A. Yes.

Q. I mean when I say resolution, the initial step taken by the council in ordering street pavements in question and that is what you understand?

A. The resolution is the first thing that passed.

Q. I am referring to these resolutions that you say you wrote, they are the same resolutions that were passed by the board of aldermen for the work in question?

A. Well I do not know whether they used the resolution I drew or not, but the substance was the same.

Q. Wasn't it literally the same?

A. I cannot say. Sometimes they would make changes in the resolutions, the aldermen themselves.

81 Q. Do you remember any changes that were made in the resolutions?

A. No, I do not call them to mind.

Q. Do you think there were any?

A. I do not remember whether there were or not. I presume the resolutions would show.

Q. You drew the ordinances for these three pavements in question?

A. No, I did not draw the ordinance for Main street, but I think I drew them for the other two.

Q. On Baltimore avenue and on Wyandotte street?

A. Yes sir.

Q. Who drew the resolution for Main street, or ordinance?

A. I do not know.
Q. It was done in your office, was it not?
A. I do not know.
Q. That was the first of the three pavements, wasn't it?
A. Yes sir.
Q. The resolution so far as paving Main street and Wyandotte street, and the specification of work, are identically the same?
A. I think they are the same, that is my recollection.
Q. The resolution ordering paving on Wyandotte street and the ordinance ordering pavement on Wyandotte street are identically the same in substance to the resolution and ordinance for the paving of Main street?
A. That is my recollection.
Q. Now what position did Hugh J. McGowan and J. B. McGowan occupy with or under the defendant, Barber Asphalt Company, in and during the year 1897 at the time of the three pavements in question and at the time of the resolutions and ordinances therefor?
A. Well my understanding was Mr. Hugh McGowan was the agent of the company in this district. I do not think Jim held any official position under the company. He simply worked for Hugh.
Q. What agency was it Hugh held here at the time?
A. Agent for the Barber Asphalt Company.
Q. He was their general agent?
A. What do you mean by general agent?
82 Q. I mean their general agent here at this point.
A. Judge I do not know the extent of his agency. I just know that was his title, he was agent for the Barber Asphalt Company.
Q. At what date did he become agent for the Barber Asphalt Paving Company?
A. I do not know.
Q. Do you mean that he was the head representative of the company here?
A. I do not know whether he was or not.

Counsel for the defendant objects to the question on the ground that if the terms of his authority are in writing such writing is the best evidence.

Q. Mr. Scarritt objected on the ground that the terms of his authority were in writing. Did you ever see that writing?
A. No sir, I have not.
Q. What did J. B. McGowan and Hugh McGowan do with reference to the work here in 1897 at and before the passing and adoption of these ordinances, the passing of these ordinances and acceptance of these contracts for this paving in question?
A. I do not know what they did in regard to it. All I did was to examine the contracts after they got them.
Q. Well do you know what they did before the ordinances were passed in the way of circulating petitions among residents and owners of property on the streets?

A. I do not know about that.
Q. Didn't you see petitions that were circulated on three of those streets?
A. If they were filed I believe I did and my recollection is there were petitions by some of the property owners.
Q. Was my name on that petition?
A. No sir, I think not.
Q. Or either of those petitions?
A. No sir, I never saw your name on but one and that was Tracy avenue.
Q. Well that was not on either of these streets in question?
A. No.
83 Q. Do you know where I resided in 1897 at the time of the passage of the resolutions for these pavements and ordinances for this work and making of these contracts?
A. As far as I know you were on Tracy avenue in Kansas City, Missouri.
Q. Well I never resided in Westport, did I?
A. Not that I know of.
Q. Well would not you have known something about it if I had?

By Mr. SCARRITT: Well we admit that.

By Mr. FIELD:

Q. As a matter of fact you know that I never resided in Westport, don't you?
A. Yes, that is my understanding.
Q. And during all the year of 1897 and for many years before and ever since I have resided at 1106 Tracy avenue, Kansas City, Missouri?
A. Yes sir, as far as I know.
Q. And never was residing within the corporate limits of Westport, Missouri?
A. Yes sir.
Q. Now don't you know, Mr. Griffith, that Hugh McGowan and Jim McGowan working under him, for The Barber Asphalt Company, defendant, circulated among the resident owners of property in Westport fronting on these three streets a petition asking the board of aldermen to order this work, before any of this was done?
A. I do not know what Jim and Hugh did towards that. I say as I did before that there were petitions for this work on these streets by some of the residents of Westport, but what Jim and Hugh had to do with it I do not know.
Q. Well Jim McGowan was working for Hugh at that time?
A. In 1897 I understand that Jim was working for Hugh at the time but I do not know whether he had any official position or not.
Q. Well Hugh was the agent of the Barber Asphalt Company during that time?
A. That is my understanding.

84 Q. Well don't you know that has been Jim and Hugh McGowan's business and the only work they have had here in Kansas City, Missouri, was in the way of getting people to petition the board of alderman of Westport or council of Kansas City for work and paving by Trinidad Lake asphalt?

A. You say the only thing?

Q. Yes.

A. I do not know whether it is all or not.

Q. Well don't you know they have done that?

A. Well I know there have been petitions circulated in Kansas City.

Q. Hasn't that been the chief business of Hugh McGowan and Jim McGowan, to get work from the board of alderman of Westport or council of Kansas City?

A. I do not know. You can get that from them.

Q. Hugh McGowan does not live here?

A. I believe he calls this his home but he is at present residing in Indianapolis.

Q. Is Jim McGowan here?

A. Yes sir.

Q. He is ill?

A. Yes sir, I understand so.

Q. Now isn't it a habit of theirs to attend the council meetings of Kansas City and the meetings of the board of aldermen of Westport?

A. Well I seldom attend the council meetings. I do not know. I have seen them at some council meetings.

Q. Well at the offices of the other officers, the board of public works, don't they devote their time there at the city hall?

A. They have been before the board.

Q. And got Trinidad Lake asphalt specified as the brand of asphalt to be used in pavements, in the interest of the defendant?

A. I presume they do. That is the only kind of petition they ever circulate when they do circulate.

Q. Who prepared the form of petition for use in Kansas City and Westport?

A. I think Kansas City prepared it for them,—I don't know,—the city authorities.

Q. There is nothing in the Kansas City charter or was nothing in the Westport charter that required it?

A. No sir.

85 Q. There is no provision in either the charter of Kansas City or the Westport law under which Westport was acting at the time of this paving requiring any petition as preliminary for authority to the board of aldermen passing these ordinances?

A. No sir, I do not know of any.

Q. You are pretty familiar with it, are you not?

A. Yes sir.

Q. You have made a kind of specialty of public improvement law in the interest of this company?

A. I am pretty familiar with it.
Q. You are regarded as an expert?
A. I do not know.
Q. You are the man that has looked after this class of work for your firm?
A. Well, I don't know,—I did most of that work there.
Q. You did as to these three?
A. Yes sir.
Q. And you wrote two of the resolutions and two of the ordinances?
A. Yes sir.
Q. Baltimore avenue and Wyandotte street?
A. Yes sir.
Q. The Main Street resolution and the Main Street ordinance you did not write?
A. No, I did not write those Judge.
Q. I notice in the contracts variations of typewritten matter occasionally,—I will ask you if that came from your hand?
A. You mean the specifications?
Q. I mean the contract including the specifications.
A. I do not remember about that Judge.
Q. Have you read over the bill that I filed in this case?
A. Yes.
Q. Now in the 8th charge of my bill I set out the specifications there taken from the resolutions and ordinances on Main street and on Wyandotte street,—have you examined the clause that is quoted there?
A. Yes,—you mean in your bill?
Q. Yes.
A. Yes sir, I have examined that.
Q. That clause is also in the contract, is it?
A. You say that is in the contract?
Q. Yes.
86 A. I did not compare it carefully. I looked at it in a general way.
Q. Well if it is correctly copied?
A. Well if you will let me have the contract I will state.
Q. Well I haven't it here. Didn't you compare it in your office?
A. No, I did not compare it.
Q. Now I will just show you the ordinances,—now I will ask you to take the certified copies of ordinance I show you there on Main street, and resolution, and the ordinance and resolution for paving on Wyandotte street and state whether or not they are correctly copied, the provision in charge eight of the bill is correctly copied.
A. Do you want me to compare them here?
Q. If you will.

Counsel for the defendant objects to the question as calling for a conclusion and for secondary evidence.

By Mr. FIELD: I offer in evidence certified copy of resolution num-

ber 540 and ordinance number 1803 of the board of aldermen of the city of Westport, the ordinance approved by the mayor October 5th, 1897, and ask that it be marked Complainant's Exhibit "1."

I now offer in evidence resolution of the board of aldermen of Westport number 590 and ordinance number 1931, approved by the mayor November 18th, 1897, and certified to by G. L. Love, city clerk, and ask that it be marked Exhibit "2."

(Said papers were at this point marked Exhibits "1" and "2" respectively by the notary and are as follows:)

(Above papers are inserted in record hereafter.)

87 By Mr. FIELD:

Q. As I understand you prefer not to make an examination of that part of the bill to see whether it is correctly copied or not?

A. Yes,—because it shows for itself.

Q. I will ask you to look at these resolutions and ordinances, Exhibits One and Two and read the clause therein wherein the base of the street pavements on Main street and Wyandotte street is declared. I am examining you now specially with reference to charge 8 of the bill. In that charge is a quotation from the specifications in the resolutions, ordinances and contracts for the amount of work on Main street and Wyandotte street. I will ask you this question,—What specification therein or elsewhere shows the depth or thickness of the base of broken stone that was laid on the existing macadam under the three inches of pavement required on these streets by the respective ordinances and contracts?

Counsel for the defendant objects to the question as calling for the conclusion of the witness, the specifications speaking for themselves.

A. The resolution on Wyandotte street that was given me shows that the base consists of broken stone laid on the present macadam, of such thickness as to bring the base up to within three inches of the finished surface of the pavement.

Q. Is there anything else in the ordinance except that?

A. Well the ordinance reads like the resolution.

Q. What street is that you read from?

A. That is Wyandotte.

Q. Now take the Main Street resolution,—what does that say about the base of the pavement, about the depth and thickness under the three inches?

A. That is the same as the other.

Q. No depth or thickness specified in that ordinance for the base of broken stone to be laid on the macadam?

Counsel for defendant objects to the question as incompe-
88 tent, irrelevant and immaterial, and for the reason that it

says it shall be brought up within three inches of the finished surface of the pavement.

Q. In the 23rd interrogatory in the complainant's bill you are asked this question, that is the defendant was, whether there were any specifications otherwise fixing or stating the depth or thickness of the base of broken stone required to be laid on the macadam under the three inches of pavement than was called for on Main street and Wyandotte street by the provision quoted from the respective resolutions and ordinances and contracts, in charge 8 of the bill, and if so what was it and where was it? Did you read that interrogatory accompanying the bill?

A. I have read it, yes, in the copy of the bill given me.

Q. Didn't you read it in your own copy that was served on the defendant before the answer was made in this case?

A. Yes, I read it in the copy we had.

Q. I mean the answer that was made to this interrogatory,—did you read that before it was filed?

A. Yes sir.

Q. I mean the answer to that question?

A. Yes sir.

Q. Well now are you able to now answer that interrogatory?

Counsel for the defendant objects to the question as calling for a conclusion and not for personal knowledge.

By Mr. FIELD:

Q. I am asking for personal knowledge.

A. I would like to see what I answered.

Q. I will put that interrogatory this way,—if there is any other specification than the one named of the base of broken stone, I mean its depth, on which is required to be laid the three inches of pavement, than what is stated in the 8th charge of the bill, please state it.

A. My recollection is, Judge, that the plans drawn up
89 show the depth of base. In other words, show the grade that the macadam was to be cut down to within three inches below the established grade.

Q. Where did you see that?

A. My recollection is that was on the plans drawn up that were on file at the time this contract was let. Mr. Abercrombe usually prepared the plans along with the specifications and on these plans he always showed a cross-section showing the surface of the street corresponding to the established grade of the street, and then he would show the thickness of the binder and thickness of the wearing surface.

Q. What ordinance was this fixing the base of this stone, the depth of it and thickness?

By Mr. SCARRITT: He did not say that. He said the ordinance establishing the grade.

By Mr. FIELD:

Q. As I understand then there was no ordinance specifying the base of this stone, the base of these street pavements on Wyandotte and Main streets? The ordinance you refer to merely spoke of the established grade of these streets?

A. I said there was a general ordinance establishing the grade and I think these ordinances established it by making these plans a part of the paving ordinance.

Q. You think the ordinance I copied in the evidence established the grade?

A. It with the plans established the thickness of the base.

Q. What does the provision you refer to say?

A. It says the work must be done in accordance with the plans and specifications on file with the city engineer and I said my recollection is, the plans showed the finished surface of the pavement to correspond with the established grade of the street.

Q. The only specification you can point out was on the plans?

A. In connection with this ordinance.

Q. There is nothing in this ordinance fixing the grade of
90 the street, there is nothing in the established base, it just says so far above the city directrix?

Counsel for the defendant objects to the question as incompetent, irrelevant and immaterial.

By Mr. SCARRITT: I want you to let the witness make his answers to the questions you ask.

By Mr. FIELD:

Q. Let me get that clear. I want to make it clear I am right or wrong and I am endeavoring in several questions to make it plain. Now where do you claim it has specifically provided for, the base of broken stone that is to be laid under the three inches of the pavement?

By Mr. SCARRITT: Let him answer the question completely.

A. I say the plans and specifications which are made a part of these ordinances were on file at the time the ordinances were passed, that these plans taken in connection with the ordinances establish the depth of that base. In other words,——

Q. Well you are arguing now.

By Mr. SCARRITT: Wait a moment. Let him answer your question.

A. In other words the specifications as I understand them require the present macadam to be cut down to a depth three inches below the established grade of the street and that established grade of the street is the same as the finished surface of the pavement.

Q. Now these specifications are copied in the contracts, are they not?

A. The specifications?

Q. Yes, I mean the contracts for this work that you signed, the specifications are copied in them?

A. Yes, and the plans are separate

91 Q. Now you say there is a clause in there that the macadam shall be cut down three inches below the established grade of the street?

A. I said the plans and specifications together show it. The specifications say it is to be cut down to three inches below the established surface of the pavement. The plans show the grade of the finished surface of the pavement.

Q. Now is there anything on the plans showing what you state?

A. I said the cross section of the pavement shows it.

Q. What words are used there that give that meaning?

A. Well there is the cross section there showing it must be cut down.

Q. Now isn't it a fact there is not one word copied in the contracts?

A. It is in the contracts.

Q. Now isn't it a fact that there is not one word stated in those specifications copied in the contracts on which it was let about the finished grade of the street?

A. I said it was to be cut down three inches below the finished surface of the street. I would not undertake to say everything that is in there. I think there is something in there about the grade too.

Q. Well there is not.

A. They will show.

Q. You would not claim it was anything more definite than the ordinance and resolutions about this pavement?

A. Nothing unless there is something about the grade.

Q. There is nothing saying the finished surface of the street shall be the grade of the street?

A. I could not say.

Q. Now you say your recollection is there is something in the plans?

A. Yes, that is my recollection.

Q. Now that is all you are banking on?

A. That is all I can think of at present.

Q. If that ordinance is not definite and certain as to the depth and thickness of the base by something on your plan it is just the same as the provision quoted in the 8th section of the bill?

91a By Mr. SCARRITT: You need not answer that.

By Mr. FIELD:

Q. Now you are not positive that that plan shows any such fact?

A. I said that is my recollection and I examined it.

Q. Did you look at it particularly as to that provision?

A. Yes, as I said I always look particularly after the grade.

Q. These contracts and plans you refer to are now at the office of the city engineer of Kansas City, Missouri?

A. The contracts are but I would not say where the plans are. I saw the contracts. Those Westport matters are scattered around all over the city hall and you can't find half of them.

Q. Do you know when these tax bills were delivered on Wyandotte street by Westport?

A. No, I can't tell, Judge, only what I heard. Mr. Peck who got the bills came into my office the day they were delivered to him and told me they had been delivered to him and I remember because I cautioned him particularly to get them before the annexation, on Baltimore avenue and Wyandotte street.

Q. Did you see those bills before Westport was taken into Kansas City?

A. No sir, I never saw them until I got ready to bring suit.

Q. So that you do not know as a matter of fact then when the Barber Company got these bills?

A. No sir, nothing more than I have just stated.

Q. I say you did not see these bills?

A. No sir.

Q. When did Westport cease to exist?

A. My recollection is the annexation was on the second or third of December, 1897.

Q. Then Westport ceased to exist and became part of Kansas City?

Counsel for defendant objects to the question as asking the witness for a statement of the law.

A. That is the legal conclusion of it.

916 Q. Well Kansas City took in Westport on the second or third of December, 1897?

A. Yes, the extension was consummated on that date.

Q. Is there any dispute about that?

By Mr. SCARRITT: I do not know what the disputes are. I expressly admit in the pleadings that it was extended.

By Mr. FIELD:

Q. Who prepared these specifications that were on file out there for this work in the office of the city engineer?

A. Mr. Abercombe the city engineer.

Q. Did you see them?

A. I looked them over when I examined the contract some time before.

Q. Did you see them before the passage of the resolution by the aldermen?

A. No.

Q. And you do not know who prepared them or who filed them?

A. I think they were usually prepared by Mr. Abercombe or his clerk.

Q. When did you first see these specifications for each of these pieces of work,—was it before or after the adoption of the resolution by the board of aldermen?

A. Why Judge I did not usually see the specifications until I went out to examine the contract.

Q. Well that was after the passage of the ordinances?

A. Yes, after the passage of the ordinances I examined the contract.

Q. That is all.

By Mr. FIELD: Make a note that I want to go on with the cross-examination now. Mr. Scarritt for defendant asks that we adjourn for noon hour and the taking be resumed at 2 p. m.

The hour being about 12.15 p. m. the notary adjourns further taking until two p. m. when taking was resumed as follows:

(Same witness)—Cross-examination by Mr. SCARRITT:

91c Q. Mr. Griffith was the estimate of cost of the work of paving each of the three streets referred to in complainant's bill, namely Main street, Baltimore avenue and Wyandotte street, submitted to the board of aldermen of Westport before the defendant company entered into contracts for those respective works?

Counsel for the complainant objects to the question as calling for a matter in writing, or that ought to be in writing, and not competent.

A. Yes sir, there was.

Q. State just what you know about that estimate and when it was made and when it was submitted to the board?

Counsel for complainant makes same objection as just above.

A. The estimate was made by the city engineer, Mr. Abercrombe, and submitted before the bids for the work were advertised for.

Q. Do I understand you to say there was an estimate, a separate estimate of the cost of the work on each of those streets?

A. Yes sir.

Q. What was the amount?

Counsel for complainant objects to these questions as calling for a matter in writing, or that ought to be in writing, and which is therefore incompetent to be thus stated.

Q. What was the amount of each of those estimates, if you know?

Complainant makes same objection as above.

A. My recollection about that is that it was about $2.10 a square

yard. The estimate submitted before the contract was let exceeded the price at which the contract was let.

By Mr. FIELD: I move to strike out the answer to the question because it states matter that ought to be in writing and it is argumentative.

By Mr. SCARRITT:

91*d* Q. Did the estimate contain a statement of the aggregate number of yards of pavement to be laid under each contract?

Counsel for complainant makes same objection as above.

A. Yes sir.
Q. And the total estimated cost of the work?
A. Yes sir.
Q. What was the total yardage stated in each estimate?

Counsel for complainant makes same objection as above.

A. My recollection is the number of square yards in the estimate submitted for each street is the same as the number of yards in each contract where it says approximate estimate. Wyandotte street is 15500 square yards. My recollection is that that was the yardage stated in the estimate on Wyandotte, and on Main street 23000 square yards, and Baltimore Ave., 12500 square yards.
Q. And the estimated cost was found by multiplying the total yardage as here stated with the price at which the engineer fixed the probable cost?

Counsel for the complainant objects to the question for the same reasons as above and as leading.

A. Yes sir.
Q. State whether you personally saw these estimates?
A. I did, yes sir.
Q. What was the occasion of your seeing them?
A. When I examined the contract I looked to see what the estimates were and whether or not the bid was within the estimate.
Q. And you found, did you, that the contract price was less than the estimated price in each instance?

Counsel for complainant makes same objection as above?

A. Yes sir.
Q. That is all.

Re-direct-examination by Mr. FIELD:

91*e* Q. What papers do you hold in your hand?
A. I have got the contracts for paving Main street and Wyandotte street.

Q. Both contracts?
A. Yes.
Q. Now is there anything in that contract, anything stating the number of yards in the contract for Main street?
A. Yes the approximate estimate is 23000 square yards for Main street.
Q. Is that in the body of the contract or before the contract?
A. It is at the head of the contract.
Q. Well it is before the contract?
A. It is after "approximate estimate."
Q. What is the heading?
A. "Approximate estimate 23000 square yards. City of Westport, 1897. Contract and specifications for constructing asphalt pavement on Main street from center line of 31st street or Springfield avenue, to south line of Westport avenue in the city of Westport.
Q. Now this matter you have testified to about the estimate,—that was in writing, was it?
A. Yes sir.
Q. Is that a different paper from the one you have before you?
A. Yes sir.
Q. It has not been shown you here?
A. No sir.

By Mr. FIELD: I move to strike out his evidence on the contents of supposed estimate filed by the city engineer on the ground that the paper itself is the best evidence.

Q. Now that paper that you hold in your hand you say is the contract and specifications for the work in question on Main street?
A. Yes sir.
Q. You were examined somewhat this morning about these specifications?
A. Yes sir.
Q. I will ask you to look through that contract and specifications and find the clause which you referred to this morning which has any reference to the base of stone laid under the three inches of pavement?
91½e A. What I referred to Judge was at the bottom of page 2 of the contract and specifications, as follows, "The term grade used in these specifications is understood to refer to and indicate the legally established grade of the street."
Q. Now what clause is there in the specifications there that anywhere refers to grade and comes within the definition of this printed clause that you have read over.
A. It mentions the sub-grade and foundation.
Q. Read it.
A. "The portion of the roadway to be paved shall be excavated from the present surface thereof to a depth of three inches below and parallel to the surface of completed pavement. Where the sur-

face of the present macadam is below a plane parallel to and three inches below the surface of the completed pavement broken stone shall be laid on the present macadam of such thickness as to bring said base up to within three inches of the finished surface of the pavement. Then next is the binder course. "Upon the base as above prepared there shall be spread a binder course of bituminous concrete composed of clean broken stone not exceeding one and a half inches in their greatest dimensions, and the asphalt cement made as herein specified, the parts to be thoroughly heated and then mixed by machinery in a preparation of not less than 15 gallons of asphaltic cement to one cubic yard of broken stone. The mixture shall be spread upon the base with hot irons and rakes and while in a hot and plastic condition shall be rammed and rolled until it forms a compact and thoroughly banded binder course of a thickness of not less than 1½ inches, with an even and uniform surface parallel with and 1½ inches below the completed surface of the pavement. The wearing surface; upon the foundation thus prepared there shall be placed an asphalt wearing surface of not less than 1½ inches in thickness when thoroughly compressed, which shall be manufactured and laid as follows:

91*f* By Mr. FIELD: I object to that as not responsive to the question. You are going clear around my question and haven't answered it. If you desire to put those things in it comes in regular at another place. I asked you the question, I want all specifications that relate to the base under the three inches of binder course and surface pavement.

A. Now after that mixture, the surface mixture thus prepared shall be delivered on the street at a temperature of not less than 250 degrees Fahrenheit. It shall then be quickly spread by means of hot iron rakes in such manner as to insure an even and uniform surface and to such depth that after having received its ultimate compression it shall have a thickness of not less then 1½ inches." Now here is another I should have put in before the sub-grade and foundation, "The plans and specifications on file in the office of the city engineer relating to the work herein contemplated and all plans which may be made by the city engineer subsequent to the date of this contract of a supplementary nature thereto are understood to be a part of this contract and specifications.

Q. Have you said everything you want to say now?

A. I have on that point I believe.

Q. I will ask you to pick out from the mass of confusion in your answer the depth and the thickness of the base of stone to be laid on the macadam under the three inches of binder course and asphalt paving called for.

By Mr. SCARRITT: Witness on the advice of counsel declines to make any different answer.

A. That is my answer. And I think that answers the question.

By Mr. FIELD: I did not call for any answer to that.

91*g* A. I will answer it the best I know how.

Q. I am asking you, Mr. Griffith, not for the surface pavement composed of an inch and a half of Trinidad Lake asphalt and its component parts or its concomitants, or the inch and a half of binder course thereunder,—what I sought to get from you is what is there in the specifications as to the depth and thickness of the layer of broken stone under this three inches. That is all I want. I asked you to pick out the clause in the specifications that covers it. Is there anything in the specifications that were on file in the office of the city engineer that is a part of that contract specifying the depth and thickness of the base of broken stone that is to be laid under the three inches?

By Mr. SCARRITT: He has answered the question.

By Mr. FIELD: I wish you would let him answer it. I will let the court see I have made an honest effort to get it.

A. Well I answered that question, I think I have answered it.

By Mr. FIELD:

Q. I am asking you, Mr. Griffith, to please exclude from your answer anything about this three inches, the surface part of the paving. My question as you understand or must understand or ought to understand or ought to know, relates to the base under the surface, and I ask you to pick out that and answer that part of the question.

A. I have picked out in these specifications the matters which go to determine the thickness of that base.

Q. You also read there in connection with your answer the component parts of the pavement embraced in the three inches surface pavement.

By Mr. SCARRITT: I don't see why you want to ball this thing up so.

91*h* By Mr. FIELD: You are balling it up, not I.

Q. Haven't you in answer to my question calling for the broken stone laid in this base, haven't you embodied in your answer matters covering the three inches of surface pavement?

A. I am endeavoring to say everything that bears on that question relating to the base.

Q. Read him the question then and let us have an answer to it.

(Question read.)

A. I have answered the question the best I know how.

Q. Don't you know that all the matters you have read off here

do not refer to the base of stone laid under the three inches of pave ment?

A. No, I do not. I think they do. I think they bear on the ques tion of the thickness of the base.

Q. Are you arguing this question now?

A. I am answering your question. I am not answering it the way you want me to. I am answering it the way I understand it.

Q. Did you understand me as asking *me* for the depth of this pavement to the bottom?

A. I understood you to ask me for the depth of the base.

Q. Now there is a three inch surface pavement?

A. Yes sir.

Q. Now let us simplify that, we will call that the three inches surface,——

By Mr. SCARRITT: Call them what they are.

By Mr. FIELD:

Q. There is an inch and a half binder course and an inch and a half on top of that called the surface pavement. Now you understand that that ordinance called for a base under the three inches I have designated?

A. It calls for a base under the binder course which is an inch and a half and then the wearing surface on the binder course.

91*i* Q. Well there is an inch and a half wearing surface and an inch and a half binder course?

A. Yes sir, and under that is the base.

Q. Well this base under this three inches,—now under that there is a base?

A. Yes sir.

Q. Now I want you to point out the provisions in the specifications that specify and designate the depth or width of that base?

A. Well I say that I have read to you from the specifications the matters in there that determine the thickness of the base.

Q. Do you mean by the system of subtraction and addition of the three inch upper course to the lower course you decide,——

A. Yes, cut down the base to the three inches below the established grade and finished surface and then build up an inch and a half binder course and an inch and a half wearing surface, the grade of this finished surface above a fixed datum is shown in the plans.

Q. Can you point out anything in there that says anything about the surface of the pavement being the established grade?

A. It does not say that in so many words, no sir.

Q. Now let us see if we can figure out this base another way. You take into consideration the inch and a half of binder course and inch and a half wearing surface and say that the base being prescribed to be within three inches of the surface, I will ask you if it would not be within three inches of the surface if there was no stone

at all put in there for that base if you put on a binder course of an inch and a half and an inch and a half wearing surface?

Counsel for the defendant objects to the question as calling for a conclusion upon a hypothesis having nothing to do with this case.

A. I must confess I do not understand what you mean by that question.

Q. Well suppose there was no broken stone at all put in there, just laid on the naked macadam and no stone at all and you put an inch and a half binder course and an inch and a half wearing surface, wouldn't the base be within three inches of the surface if you did not put any stone at all there?

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A. I said it would depend on what the surface was, what the grade was,—It would be within three inches of a surface,—Now whether it was within three inches of the surface and the grade of the street here, is another question. By grade, as that term is used is meant a stated elevation in respect to a fixed datum.

Q. Suppose there had been no broken stone put in there at all and then the binder course and wearing surface, wouldn't the base be within three inches of the surface?

A. Yes, but that is not what it calls for here.

Q. Well wouldn't that let the base be within three inches of the surface of the pavement? I will ask you to exclude the three inches of binder course and wearing surface and see what is said there about what constitutes this base there?

A. I decline to answer the question because I have answered it, several times.

Q. Do you honestly think you have answered my question?

A. I do.

Q. Seriously?

A. I honestly think I have but perhaps not answered it the way you want me to answer it.

Q. You do not want to answer it any better?

A. I am confident I have answered it right.

Q. Well we will see about that now. I will show you the plans here.

Q. Mr. Griffith, I will ask you this question,—did you see the plan for the Main Street pavement?

A. Yes, my clear recollection is I examined the plan.

Q. When?

A. When I examined the contract.

Q. What words indicate to your mind what you said in reply to Mr. Scarritt's question this morning, what words were used, what was the designation of the surface of the street?

A. Why I told you my recollection about the plan, that it gave a section of the street showing the grade of the street and the surface of the pavement to correspond with the grade of the street.

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Q. Was that this plan?

A. Well I think the truth is Mr. Abercrombe used this from which to get certain information to draw the plan from. I think he took this, that plat and drew the paving plan.

Q. This plan seems to be made under ordinance 1803?

A. That is a memorandum.

Q. I understand that that is what the plan I show you purports, is it?

A. It is written in there in lead pencil.

Q. That is the ordinance for paving Main street?

A. Yes sir.

Q. You think the plan itself was drawn from this?

A. That is my opinion.

Q. Well if that is true there was no plan at all in force at the time the resolutions were passed? It seems to be drawn under ordinance number 1803, approved May 5th, 1897.

A. Plans out there, were filed usually before the resolution was passed. The ordinance number was not put in until after the ordinance was passed.

Q. Was this the plan?

A. I do not know. I think not.

Q. Is there anything on this plan that indicates the grade of the street there?

A. I do not see any cross section on this plan.

Q. You do not see anything on this plan indicating the surface grade of the street?

A. I do not see it on there.

Q. And if this is the plan under which the work was done there the plans do not indicate the grade of the street?

A. The plan speaks for itself.

Q. Well that is not my question. Haven't you stated just now you fail to find the grade of the street indicated on this plan?

A. I do not find it on that plan.

Q. Then the plan does not show it?

A. That one does not.

Q. Who is Mr. W. E. Norris?

A. There was a gentleman by the name of Norris worked for Hugh McGowan.

94 Q. Circulating petitions?

A. He has circulated petitions in Kansas City.

Q. In Kansas City?

A. Yes sir. I do not know whether he was in Mr. McGowan's employ at this time or not.

Q. I will show you the plan here. I will ask you if this is the plan for the paving of Wyandotte street in 1897, in question?

A. I do not see how I am to know. I have not kept tab of it.

Q. I mean the plan on file in the city engineer's office in Westport?

A. That is what the marks indicate.

Q. Now I will ask you to point out what there is on this plan that indicates the surface grade of the street?

By Mr. SCARRITT: I object to that because the plan speaks for itself. I can point it out. There is the plan of the street and there are the marks down there.

By Mr. FIELD:

Q. I am asking Mr. Griffith.
A. Judge I think the plan speaks for itself.
Q. You said this morning there was something on the plan showing the grade of the street.
A. Here it is. It shows the gutter and curb and wearing surface.
Q. Read it?
A. Old macadam and broken stone.
Q. How much old macadam and broken stone?
A. It does not indicate it, and on that is 1½ inch binder and the wearing surface, and there is a five inch gutter.
Q. Does that say that that is the surface of the street anywhere?
A. The curb as I understand is on the grade of the street, all curbs are required to be on grade.
Q. The top of the curb is on the grade of the street?
A. That shows the surface of the street is laid even with the top of the curb.
95 Q. That does not show that the center shall be even with the top of the curb? Read it all off. Show all there is there that shows the grade of the street.

By Mr. SCARRITT: He can't do that.

A. I will answer that the best I can.

By Mr. FIELD:

Q. I am entitled to that because you said in answer to this question that you had information that the surface of this pavement was about the grade of the street?
A. Well this shows the top of the curb. It shows the curb and the gutter and the ordinance required,——
Q. Does that show it?
A. The drawing shows it.
Q. What ordinance requires it?
A. The ordinance requiring the curb to be set to grade.
Q. There is nothing on there about any ordinance, is there?
A. No sir.
Q. Well what is there on that plan you said that indicated it?
A. Well it is that drawing there.
Q. I want a definite answer, Mr. Griffith.
A. That is as definite as I can give it to you.
Q. Is there anything on that plan that says the surface shall be the grade of the street?
A. No, it is not written out.
Q. What indicates it?

A. The drawing there.

Q. What figures or words indicate that the surface is to be on grade?

A. It is a picture, it does not say it in words.

Q. Just read the words on that plan that indicate that the completed surface of the pavement is to be on the grade of the street?

A. I say that that plan there shows the surface of the street to be on the same grade as the curb and the curb is on grade and that is a fact and that indicated that the completed surface of the
96 pavement is to be on the grade of the street.

Q. Now you cannot point out anything on the plans as I understand you that indicates it was to be done on the grade of the street?

A. No, it is not written out or spelled out.

Q. There is nothing there saying the completed surface of this street shall be the grade of the street?

A. It is planned out.

Q. What is there on the plan that says that?

A. Well I have answered that Judge. I have answered many times.

Q. That is all.

J. K. GRIFFITH.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this the 3rd day of April, 1900.

ALFRED FIDLER,

[SEAL.] *Notary Public, Jackson County, Missouri.*

Dr. G. L. LOVE, of lawful age, being produced, sworn and examined on the part of the complainant deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. Your name is Dr. George L. Love?

A. Yes sir.

Q. What position did you hold in 1897?

A. City clerk of Westport.

Q. How long have you been city clerk of Westport, Missouri?

A. For about ten years, from 1887.

Q. What was the date that Kansas City made its extension and took in Westport into the limits of Kansas City?

A. I think it was the second day of December, 1897.

Q. Do you remember the paving of Main street and Wyandotte street and Baltimore avenue in the year 1897, in the city of Westport?

A. I remember the streets were paved, yes.

Q. Who delivered the tax bills to the defendant, Barber Asphalt Company, for paving Main street, Baltimore avenue and Wyandotte street?

A. I did, I suppose. It is a part of my duty.

Q. When were the tax bills for Main street delivered, before
97 or after the city extension?—before or after Westport ceased to exist and became a part of Kansas City?

A. Main street I think was done before,—I could not remember those dates without looking at the record, to be positive.

Q. They were delivered before December 2nd, 1897?

A. Yes sir.

Q. How about the tax bills for Baltimore avenue and Wyandotte street?

A. I could not say positively as to the actual delivery of the bills, that is as to the turning over from the office.

Q. Well when were they handed over to the Barber Asphalt Company from the office of the city clerk of Westport?

A. Well I could not tell the exact time. There was a large amount of work and ordinances passed making levies of taxes. Tax bills were written up and there was a stack of them in our office for registration and there was only one book for registration and it was impossible for more than one person to work at it at a time and I don't know but I don't think that all of the bills were registered on the second day of December, that is, entered on the record.

Q. All of what bills?

A. The various tax bills.

Q. I was speaking about Baltimore avenue and Wyandotte street

A. Well they were in the bunch. I think possibly it was after the second of December when they were delivered.

Q. You mean Baltimore avenue and Wyandotte street?

A. Yes sir.

Q. Well was it or was it not after the city of Westport had become part of Kansas City that the tax bills on Baltimore avenue and Wyandotte street were delivered?

A. I think most likely it was.

Q. Don't you remember about it Doctor?

A. Well I am reasonably certain that it was after the second day of December that they were delivered.

Q. Now why were they not delivered before?

A. For the simple reason that they could not be registered
98 before that time between that time and the date of the levy ordinance, or approval of it.

Q. The ordinance levying was in November, 1897?

A. In the last days of the month there were a number of council meetings held,—almost every day for a week before the election.

Q. Now after the taxes were levied for these payments you had to register the bills in a book before you delivered them to the Barber Company?

A. Yes sir, a record was made of them.

Q. And you think that that record of the Baltimore Avenue and Wyandotte Street tax bills had not been made until after the third of December, 1897?

A. I would not say that. They were at work there and I had a

clerk to work on the tax bill record all the time day and night for several days. He worked until midnight.

Q. Several days at what time?

A. Along about that time working to midnight registering the tax bills that were issued.

Q. You would register the tax bills before they were delivered?

A. The contractors came there and signed receipts for the tax bills before that time and they did that at the time of the approval of the ordinance levying the taxes, and released the city. As soon as we notified them they came out and receipted for them.

Q. All I am interested in now are these tax bills delivered to the Barber Asphalt Company. When were they delivered to the company? Was it before of after the city extension taking in Westport?

By Mr. SCARRITT:

Q. Doctor you understand the meaning of the term delivery?

By Mr. FIELD:

Q. Well when were they handed over to the Barber Asphalt Company?

A. The bills were handed to them I think it was after the second of December.

Q. How many days after that?

99 A. I could not tell you that. I kept no record of the date of the actual delivery.

Q. But it was after the second day of December?

A. I think it was, that is my recollection.

Q. Do you remember I was out there a day or two after the extension was made and you had the tax bills there and had not delivered them?

A. Yes, we had a lot of them and a man was there working as hard as he could registering them.

Q. And that was after Westport was taken into Kansas City?

A. Yes sir.

Q. Well these tax bills were issued in your name as city clerk of Westport, were they not?

A. Yes sir.

Q. Do you remember to whom you handed these bills for the Barber Asphalt Company?

A. My recollection is it was to Mr. Peck.

Q. The receipt as I understand was given before Westport was taken into Kansas City and the bills were handed over after?

A. The receipt was given the date of the approval of the ordinance making the levy.

Q. But the bills were not handed over until Westport was made a part of Kansas City?

A. The actual delivery was made afterwards if my memory is not wrong.

Q. Well you have a pretty good memory and have kept pretty good track of things that were going on out there?

A. I think so.

Q. Do you remember the circumstances of the resolutions being introduced for this street paving on these three streets out there?

A. No, I do not particularly remember.

Q. The first step in a pavement where tax bills are issued the council would pass a resolution declaring the work necessary and defining the work?

A. Yes sir.

Q. Then after that was published for a time in the paper and there was no remonstrance filed by the resident property owners then the council or board of aldermen passed the ordinance ordering the work?

100 A. Yes sir.

Q. Then the committee of the council and the engineer would post the work and let it?

A. The city engineer advertised for bids and the city engineer and public improvement committee awarded the contract.

Q. Yes, and then after that the council approved the contract and confirmed it?

A. Yes, there was an ordinance confirming it passed.

Q. Now the contract was first executed by the city engineer, I believe, and then he reported the letting of the work to the succeeding session of the board of aldermen and then the confirmation took place?

A. Well the city engineer prepared the contract.

Q. And signed the city's name to it?

A. I do not think he did generally until after the approval of the ordinance.

Q. You do not think he signed the City of Westport's name to it?

A. I do not think he did until after the approval of the ordinance,—I remember he did before in most of them,——

Q. Well these particular ones are all we are interested in. In what shape did the contract come before the council for confirmation? Was it signed by the Barber Asphalt Company and its sureties?

A. Yes, the bond had to be signed and an ordinance passed for the approval of the contract and I know in a number of instances the engineer signed the contract afterwards as I took it to him for his signature.

Q. Well do you remember whether that was the case as to these pavements?

A. I could not say.

Q. Now when the resolution which is the first step taken for the pavement, was introduced, for these three particular pavements had a petition been presented there signed by the property owners or any of them?

A. I think it had. Those are matters of record and I never charged my mind very much with record matters. I had too much outside the record.

101 Q. Well who usually started those proceedings, how were they begun out there, what was the usual method?

A. Well under the ordinance all proceedings in relation to public improvements had to be prepared by the engineer's office and they came to me from that office.

Q. What put the proceedings on foot, what started them there? The resolution first had to be introduced in the council,—what caused that? What step had been taken before that that brought that about?

A. Well it was generally a petition filed for the work or on motion of some member of the board of aldermen.

Q. Well these three pavements,—do you remember that Mr. McGowan took out a petition signed by property owners on the street?

Counsel for the defendant objects to the question as immaterial.

A. I think he did.

Q. Was that before or after the resolution was introduced?

A. It was before.

Q. Then a resolution would be introduced by some member of the council and an ordinance passed and bids advertised for and the contracts awarded?

A. Yes sir.

Q. Now you remember Mr. McGowan had a petition?

A. Well I do not know whether he did or some one working for him. Mr. Getty was out there frequently.

Q. Well did any property owners file them there?

A. I do not know as they did.

Q. Do you know how these petitions were obtained?

A. I could not say.

Q. They were brought out there by Mr. McGowan or some agent of the company?

A. I could not say. I do not know how the petitions were circulated.

Q. Who filed them in your office?

A. They were generally brought there by some one from
102 the Barber office.

Q. The Barber Asphalt Company's office?

A. Yes sir.

Q. What brand of asphalt did the Barber Asphalt Company use here?

Counsel for the defendant objects to the question as immaterial.

A. I do not know a thing in the world only what the ordinance called for.

Q. What did the ordinance or contracts call for?

A. The petitions said they should use Trinidad Lake asphalt, that is all I know.

Q. Did anybody else ever lay any Trinidad Lake asphalt except the Barber Asphalt Company?

A. I do not know.

Q. Well you have been there for ten years,—did you ever know of the Barber Asphalt Company laying any other asphalt except Trinidad Lake asphalt?

A. No sir, not in Westport.

Q. Well anywhere?

A. No sir.

Q. Isn't it the understanding that the Trinidad Lake asphalt is the Barber Company's asphalt,—was that the understanding when those pavements were laid, that the Barber Company was paving with Trinidad Lake asphalt?

Counsel for the defendant objects to the question as calling for the conclusion of the witness.

A. Yes sir.

Q. Was it the understanding that anybody else there was paving with Trinidad Lake asphalt except the Barber Asphalt Company?

A. If there was I never heard of it.

Q. Did the McGowans attend your council meetings out there?

A. I could not say positively, but I think they were there once or twice, although I never paid much attention to it.

Q. Well don't you know they were in the habit of attending the council meetings out there when a question of paving with
103 Trinidad Lake asphalt or any other kind of asphalt was specified and they had the fixing of it?

A. Well I don't know whether I have ever seen Hugh out at a council meeting, and I don't know whether Jim has been there oftener than once or twice.

Q. Then you have seen Hugh there?

A. He was in my office. He would step in and say how do you do, and pass my door,—he would be at the engineer's office.

Q. These resolutions and things like that are begun in the engineer's office as I understand you?

A. Yes sir.

Q. Do you know anything about Scarritt, Griffith & Jones or their firm furnishing resolutions for any of these pavements?

A. I do not know whether they ever did more than once. I remember something of them. We had prepared a resolution for some work out there and on the examination that they made of the proceedings they turned the resolution down because it was a little faulty in some respects and we told them to prepare one themselves the way they wanted it. I do not know whether they prepared others or not.

Q. Now do you know anything about the specifications out there for work?

A. Nothing more than the record would show.

Q. Well were the specifications copied in the contracts that were made?

A. I think so.

Q. Bodily?

A. I think that was always done. I think the specifications were in a blank space that was filled up.

Q. You just had blank contracts struck off with a description of the work written in when the bids were made? And that was all the specification there was?

A. Well there was a working plan made.

Q. When were those plans made?

A. I think they were made between the resolution and the confirmation of the contract.

Q. Well was it before or after the passage of the ordinance?

A. It would have to be after the passage of the ordinance or about that time. If there was no remonstrance then the ordinance
104 was passed.

Q. First a resolution is passed and if there is no remonstrance then they pass an ordinance for the work and then they prepare the specifications and prepare a plan of the work and it is on that plan and the specifications that the work is left?

A. Yes sir, that is my understanding of it. I did not do that part of the business.

Q. Well do you know that that was the course of procedure?

A. That is the way I understood it, yes sir.

Q. The plan for the work came after the passage of the ordinance?

A. Yes sir.

Q. And not before?

A. And not before.

Q. Now the resolutions that were passed describe the work the same as the ordinance?

A. Well perhaps not so fully.

Q. I have for instance an ordinance you made for me,—do you remember making some certified copies of these ordinances and resolutions for me?

A. Yes sir.

Q. I will ask you to look at the one on Main street. Now compare the resolution for the work on Main street with the ordinance and see whether it is the same.

By Mr. SCARRITT: Objected to because it calls for a mere conclusion and the document speaks for itself.

A. It seems to be the same.

By Mr. FIELD:

Q. The resolution then specified the work that was to be done and the materials?

A. Yes sir.

Q. The Barber Asphalt Company had paved other streets in Westport before this, had it?

A. Yes sir.

Q. And was this same Trinidad Lake asphalt used or were they supposed to have used it?

A. Yes sir.

105 Q. You do not know whether it was Trinidad Lake asphalt or not?

A. No sir.

Q. And nobody else does I guess?

A. I do not know a thing about that.

Q. Do you know where they get this from?

A. No sir.

Q. Did Mr. McGowan ever tell you?

A. No. The ordinance I think says, specifies it is to be lake asphalt from the pitch lake in the island of Trinidad,—that is one of the statements.

Q. There is a sort of a charm to that, is there?

A. I do not know.

Q. As I understand you no property owners came down there to your council and asked your council to pass these ordinances and resolutions?

A. Well I am inclined to think that some of the property owners were there asking for it.

Q. Well who?

A. Well I do not know. The lobby was pretty full when the council met.

Q. They had a lobby there, did they?

A. Well it was pretty full.

Q. The contractors were there, were they?

A. I do not know.

Q. Were the Barber Asphalt people there?

A. I suppose they were there.

Q. They attended the council meetings of the board of aldermen, did they?

A. Well Mr. Getty was out there generally to those council meetings.

Q. Seeing that the council was passing these ordinances?

A. I do not know.

Q. Talking to them?

A. I do not know.

Q. He was on hand there until these ordinances were passed?

A. Yes sir.

Q. They pretty generally went through when he was out there, didn't they, Doctor?

A. Well I do not know whether they went through any more because he was there or not.

Q. Now do you know my property out there in Westport

106 or in that territory?

A. I know some of it.

Q. Is it vacant or improved?

A. It is vacant property that I think of on 39th street between Main and Baltimore north of the Baptist church.

Q. That is block 45 Hyde Park?

A. It is in the forties somewhere. Forty something. I do not remember positively whether it is 45.

Q. I speak of the piece right opposite the car barn, some fronts on Baltimore avenue and some on Main street.

A. Yes sir.

Q. Now do you know the condition of the macadam along in front of my property you speak of on Main street at the time you speak of?

A. I think that block of macadam was in first rate condition.

Q. It had 12 inches of macadam?

A. I think fully. The fellow did a splendid piece of work when it was done.

Q. Was it in fair condition when this piece of work was done in 1897?

A. It was in fair condition, yes sir.

Q. It was laid there how many years before?

A. It was put down in the fall of 1891 or summer of 1892, I do not know which.

Q. Don't you remember it was in the summer of 1892?

A. It was in the early part of 1892.

Q. It cost about two dollars a front foot, didn't it?

A. I think so, somewhere in that neighborhood.

Q. Now do you know anything about,—I believe Baltimore avenue was not paved at all before this pavement in question?

A. It was a dirt street.

Q. It was a dirt street before this Barber Asphalt Company paved it?

A. Yes sir.

Q. Now Wyandotte street is the next street west, I believe?

A. Yes sir.

Q. Now I own property over there that is involved in this controversy, between 38th and 39th on Wyandotte street, I will ask you if a very few years before the putting down of this asphalt
107 pavement in 1897, that street had not been macadamized also?

A. Yes sir.

Q. About how long before?

A. I do not know. It was in 1893, I think.

Q. Now what was the condition of that macadam pavement between 38th and 39th on Wyandotte street at the time of this Barber asphalt pavement in 1897?

A. The condition of the macadam?

Q. Yes.

A. It was a very good street, I think.

Q. The pavement was in good condition?

A. I think so.

Q. Was my name on any of those petitions?

A. I do not remember it.

Q. You never saw my name on any of those petitions calling for that pavement out there?

A. I do not think I did, but I would not be certain.

Q. Did I reside in Westport at the time of these pavements in 1897?

A. I think not. I did not count you a resident.

Q. You never knew me to reside in Westport?

A. No sir.

Q. My residence was in Kansas City, Missouri, at that time?

A. That was my understanding.

Q. Did The Barber Company, defendant, ever ask any resolutions to be passed there until they had circulated a petition among the property owners of Westport?

A. I think not.

Q. The habit was to circulate a petition first and then bring it in signed and then a resolution was introduced?

A. That was after 1895.

Q. There was nothing in the law of 1895 requiring any petition before the resolution, was there?

A. No, my recollection is there was never any law requiring a petition either 1895 or previous. The 1895 law reads the majority of the resident property owners could stop a pavement by petition.

Q. It did not give me, a non-resident owner, any right?

A. No sir.

108 Q. It doesn't give me any right if I would come out and protest?

A. No sir.

Q. This petition was circulated before the resolution was passed?

A. I suppose so.

Q. And filed in your office?

A. Yes sir.

Q. It was kind of corked from the start, to use a vulgar phrase?

A. It was started that way.

Q. Do you know what consideration was given any of those people that signed those petitions?

A. No sir.

Q. When it was specified out there that the pavement should be Trinidad Lake asphalt it was well known then that it could not be anybody else but the Barber Asphalt Company that could get the contract?

A. I do not know whether it was or not. The thing was open to anybody under the specifications.

Q. Anybody that could furnish Trinidad Lake asphalt?

A. Yes sir.

Q. And the Barber Company brought that petition out there and had that specified each time?

A. It was in the petition, the petition specified that.

Q. And they brought it out there?

A. Yes sir.

Q. I believe you can take the Doctor.

Cross-examination by Mr. SCARRITT:

Q. When the property owners signed a petition addressed to the mayor and board of aldermen to have their street paved according to stated specifications was it not customary for the officer who drew up these preliminary resolutions to follow the specifications of the petition?

A. I think it was an exact copy.

Q. That was the practice and mode of doing business by the city officials, was it not?

A. Yes sir.

Q. Now the engineer would first make his plan of the street and detail when he would draw up the resolution, would he not. and then file that in his office and subsequently file the plat with
109 you as city clerk?

A. I do not know whether he did it on the preparation of the resolution or the ordinance. I think though it was generally after the ordinance was passed.

Q. Well these plats were required before the letting of the work, to be filed in your office, and you do not know anything about them officially until they were filed in your office?

A. Not until they were presented to me.

Q. You had nothing to do with the preparation of them?

A. No sir.

Q. And I understand you that you cannot state that they were not prepared by the engineer at the time he prepared the specifications for the work?

A. I could not tell. I know they were prepared before they advertised for bids.

Q. And they were always filed in your office before that time?

A. Yes sir.

Q. And before that time they were deposited with the engineer?

A. I think so. I could not testify as to the course of business in his office.

Q. You do not know and cannot state the exact date when the engineer would prepare that?

A. No sir.

Q. Now Doctor did the engineer always prepare and submit to the board of aldermen an estimate of the cost of the work before the bids were received?

Counsel for the plaintiff objects to the question as calling for incompetent testimony. The estimate is the best evidence.

A. Well my recollection is that he did always. The record will show though.

By Mr. FIELD:

Q. I have got your record here, Doctor.

By Mr. SCARRITT: I am going on now Judge.
By Mr. FIELD: Here it is.
10 By Mr. SCARRITT: Yes, there it is.
By Mr. FIELD: He does not want it.
By Mr. SCARRITT: This need not be put down.
By Mr. FIELD: Put down everything.

By Mr. SCARRITT:

Q. Do you recollect whether the cost of each piece of work as estimated by the engineer and transmitted to the board of aldermen was in excess of the contract price of that work?
A. I do not think it ever was.

By Mr. FIELD: I move to strike that out because it is not the best evidence; it calls for the conclusion of the witness and for secondary evidence and is not the best evidence.

A. The contract price was generally, according to my recollection less than the estimate.

By Mr. SCARRITT:

Q. Do you recollect a single instance where the contract price was more than the estimate of the cost of the work?

Counsel for the plaintiff makes same objection as just above.

A. No sir.
Q. Do you know whether those estimates were preserved anywhere?
A. They were all delivered to Kansas City with the papers of the office. I cannot say anything further than that.
Q. That portion of Main street provided to be paved under the proceeding referred to in the bill in this case is a continuation of Main street in Kansas City, Missouri, is it not?
A. Yes, I believe it is known as Main street, it was at that
111 time perhaps as Grand boulevard, I think that was the official name at that time.
Q. The city limits at that time of Kansas City joined the city limits of Westport, did they not?
A. Yes sir.
Q. And this Main street in Westport was a part of one continuous thoroughfare down into the center of Kansas City, Missouri?
A. Yes sir, the principal one.
Q. Baltimore avenue was a parallel street next adjoining Main street to the west?
A. Yes, between Westport avenue and 33rd street.
Q. And there is a Baltimore avenue in Kansas City, Missouri, next west and parallel to Main street?
A. Yes sir, on the same line I think.

Q. And the next street west of that in both cities is Wyandotte street, is it not?

A. Yes sir.

Q. Those three streets in Kansas City, Missouri, at that time were three of the principal streets in that city and they were three of the principal streets in Westport at that time also?

A. Yes sir, especially Main and Wyandotte.

Q. And were there not some handsome residences on Main street at that time in Westport?

A. Yes sir.

Q. Name some of them?

A. Well there is Mr. Thomas Mastin's residence.

Q. Where is that located?

A. 35th and Main.

Q. What was the cost of that?

A. About a hundred thousand dollars I am told.

Counsel for the complainant objects to these questions as immaterial.

A. And at the corner of 36th and Main is Mr. McLeod's residence, a very handsome property.

Q. What is the probable cost of that?

A. Well I do not know. Twenty-five or thirty thousand
112 dollars I should expect it would cost when it was built. It is a handsome place.

Q. Name any others.

A. Right opposite that on Main street are three nice brick residences and south of them two others between that and 37th street and on 38th and 39th there are two very nice residences on the east side of the street and south of 39th street is the Metropolitan car barn and a row of business houses, I do not remember how many. North of 35th street there is at the corner of 34th, there is a nice row of flats, I do not remember how many, about ten of them I think,—three story. At 33d street there is Mr. Seested's residence, A. F. Seested, and north of that and adjoining it Major Warner's residence.

Q. United States district attorney?

A. Yes sir.

Q. A very handsome place, isn't it, Doctor?

A. They are both very handsome places.

Q. Seested's and Warner's?

A. Yes sir, and next to that is the old home of Lee Talbott.

By Mr. FIELD: I shall object to any further inquiries on these matters on the ground that there is nothing in chief that calls for the proof and I shall ask to have the costs of this examination taxed against defendant as to the inquiry about these residences and I object on the further ground that it is immaterial testimony.

A. Next north of it at the corner of 32nd street are two very hand-

some stone residences and then north of that there is quite a row of business houses and residences, I do not remember how many of them, a good business block, at the corner of 31st, and two or three residences on the west side of the street there.

Q. Dr. Horrigan's residence is there?

A. Dr. Horrigan and Nick Miller's residences, and another house belonging to Meyer Brothers Drug Company, and I think that is all the houses that were there at that time.

113 Q. Now since this pavement was laid has the improvement continued and other expensive residences been put up there?

Counsel for the complainant objects to the question as immaterial.

A. Yes sir, there have been several. I recall two right now. Judge Ellison's,——

Q. Judge of the court of appeals?

A. Yes sir.

Q. A very handsome place?, and there is another house north of him and another house opposite. Stephens, the auction man owns one of them, and at the corner of 35th is one of the prettiest little places in town I think.

Q. Robert Taylor's?

A. Yes sir; and north of 33rd street there are three houses in there and all three good houses,—one of them is an excellent house.

Q. Slavens has quite a handsome structure?

A. Yes sir.

Q. And A. W. Armour and Mr. Kirk Armour and Mr. Ed Smith just off this street on 35th?

A. 35th and Walnut.

Q. They are some of the handsomest residences in the city, are they not?

A. Yes sir.

Q. And they use this Main street in the passage backward and forward from their homes to Kansas City?

A. Yes sir.

Q. Are there any handsome residences on Baltimore avenue?

A. Yes sir, there are some nice residences since the work was begun, and there were several good ones before it was begun, and at 33d and Baltimore avenue there are some handsome residences.

Q. Now all the improvements you refer to front on Main street, the fronts are abutting on Main street, they front on that street?

A. Except Armour's.

Q. Now Wyandotte street,—is that street well improved also?

A. South of 36th it is built up. There is a good class of buildings, there are quite a number of them,—there is one house north of 35th street.

114 Q. And Mastins owned property on Wyandotte north of 35th street, do they not?

A. I think the title at that time was in Morse & Hubbard, although I understand it was Mastin's property.

Q. Mr. Jones' house at 35th and Wyandotte is a handsome place, is it not?

A. Very handsome, yes sir.

Q. Speaking generally of this district, I mean property bordering on those streets, the streets that were improved,—it is now one of the handsomest residence sections of Kansas City?

A. Yes sir, it surely is.

Q. The special tax bills issued to the Barber Asphalt Paving Company for the work of paving Main street were issued on the 21st of October, 1897, were they not?

A. If you have got the record I could tell. Yes sir, I think that is it. The stamp indicates the issue on that date.

Q. Well your name is stamped on there after the memorandum dated October 5th, 1897,—October,—10-21-97? Signed G. L. Love, city clerk. Is that a correct certificate?

A. Yes sir.

Q. Then you have a stamp also on the back of the bill, this bill issued October 21st, 1897, G. L. Love, city clerk,—that is the date at which the bill was issued?

A. That is the date at which the bill was delivered.

Q. And on that date you took a receipt from the contractor for the bill and in that receipt he relinquished all claim against the city?

A. In the receipt, yes sir.

Q. Now as I understand it the ordinance of the city of Westport numbered 2046 making the levy of the special tax to pay for the paving of Baltimore avenue under the contract and ordinance referred to in the bill of complaint in this case, was approved by the mayor on the 18th day of November, 1897?

A. That would be a question of record. The bill recites that fact and I take it to be correct.

115 Q. That levy ordinance takes effect, does it not, on the approval by the mayor?

A. Yes sir.

Q. As I understand you, Doctor, these bills were actually made out exactly in their present condition and signed by the engineer and stamped by you and the bills actually shown to the representative of the Barber Asphalt Paving Company and his receipts actually signed for those bills and delivered to you before the 2nd day of December, 1897,—isn't that a fact?

Ceunsel for the complainant objects to the question as confusing and embodying so much that the witness cannot keep track of it very well.

A. The bills were made out and signed by the engineer and in my office at the time I took the receipt of the Barber Asphalt Company for the bills. They were not registered in the tax bill register at the time.

Q. And wasn't it understood between him and you that he would

leave them there in order that you might complete your record of the registration of the bills?

A. Yes sir, that was the understanding.

Q. And they were left there solely for that purpose and no other?

A. That is all.

Q. And wasn't it distinctly understood between you and the representative of the Barber Company that these bills were not yours or the property of the City of Westport but were there simply to complete the record of them?

A. That is my understanding, that I was the custodian until the record was completed.

Q. And as soon as that was completed he got the bills?

A. Well, or within a few days.

Q. Don't you know that he consulted his attorney whether it would be legally proper that that course be pursued and he was advised that it was and so told you?

116 A. I think he made that statement and I think our city attorney of Westport made the same kind of a statement.

Q. Was it discussed between the city attorney of Westport and the attorneys for the Barber Company, that represented the Barber Company, and yourself, as to how these bills could be legally delivered to the Barber Company before the city of Westport became consolidated with Kansas City, and at the same time give you an opportunity to complete the registration of these bills?

A. Yes, that was talked over pretty generally.

Q. And this method as you have stated was adopted to carry out that purpose and intent, was it not?

A. Yes sir, the idea seemed to be that the ordinance making the levy was itself a lien on the property but the record of the lien or registration was a different thing and that followed at the convenience of the clerk.

Q. Now the ordinance numbered 2047 of the city of Westport that provided for the levying and assessing of the special tax to pay for the work of paving Wyandotte street under the ordinance and contract mentioned in the complainant's bill, was approved by the mayor of that city and became a binding law on the 18th of November, 1897, was it not?

A. Yes sir, perhaps so,—yes, that shows it here.

Q. Now you may state whether or not the special tax bills given by the city of Westport for the work of paving Wyandotte street were not written up and signed by the city engineer and stamped by you as issued on November 22nd, 1897, and prepared exactly in their present condition prior to the second day of December, 1897?

A. Everything with the possible exception of the issuing stamp, Judge, the issuing stamp,—I am not positive about that.

Q. And didn't you turn these bills over to Mr. Peck as the representative of the Barber Company and take his receipt for the bills reciting that they were accepted by him in full payment of

117 the contract price of the work, prior to the second day of December, 1897?

A. Yes sir, the bills were prepared and I took his receipt for them.

By Mr. FIELD:

Q. And were they turned over to him?

A. That was covered by the explanation a while ago.

By Mr. SCARRITT:

Q. Now if these bills were in your possession after the second day of December, 1897, you may state how it happened that they were.

A. The council, as I stated sometime before, were meeting almost every night and there was a large amount of work to be gotten out of the office. There was a large number of tax bills that had been held bad and were being reissued and there was only one tax bill register in the office that carried all our special tax bills for street improvements and only one person could work on it at a time and I had more work myself than two men could do and I got a clerk in there to do that tax bill registering and he worked from eight o'clock in the morning until 12 o'clock at night right along, it was perhaps the 5th or 6th of December before the tax bills were all registered, those issued and those reissued.

Q. So that if any of these bills in question did remain in your office after December 2nd, 1897, they were left there merely for your convenience in order that you might complete your registration of the bills?

Counsel for complainant objects to the question as calling for the conclusion of the witness.

A. That is what I said.

Q. Now you may state at the time the representative of the Barber Company signed the receipt for the bills whether it was understood that they should then become the property of the Barber Company and were left with you in order that you might com-

118 plete the registration of the bills and that was the sole purpose they were left with you?

Counsel for complainant objects to the question as calling for the conclusion of the witness.

A. That is my understanding.

Q. Have you the receipts executed by the Barber Asphalt Paving Company for each of the series issued for these three contracts respectively?

A. They were turned over with other papers of the city, all the records of the city, to Kansas City.

Q. Do you know whether those receipts are in existence now or not?

A. I do not know. They were a few months ago, that is the book in which the receipts were kept. I suppose they are in with the others.

Q. Judge Field has asked you about the condition of the macadam on Main and Wyandotte streets as to the estimated cost of that. Just to complete that history you may state whether or not the Judge ever paid a cent for either of those improvements.

A. I could not say without looking at the records.

By Mr. FIELD:

Q. Don't you remember satisfying the record out there for those tax bills?

A. I think I do for some street. I think I satisfied the record for some bills.

By Mr. SCARRITT:

Q. Dr. Love can you tell us whether all of the streets that have been improved in the city of Westport have been paid for by special taxes levied in accordance with the frontage of the lots or tracts of land fronting on the streets according to the frontage upon the same basis that the cost of the work in question here was levied?

A. They were all paid for in tax bills levied on the property abbutting on the street but the 1895 charter made a change in the manner of computation. Now for instance in some of
119 the streets,—the street Westport avenue, part of it was only about 35 feet wide and some 66 feet wide and some 50, but the whole area of the street was computed and divided by the front feet on the street. The narrow part of it the same as the wide part,—but under the 1895 charter in paving each block had to be taken as a separate piece of work in the measuring. The intersections were measured and if there was a half intersection, that is a street came in on one side, that intersection was put on that block and each block took care of itself.

Q. But in the whole history it was all assessed according to the front foot?

A. Yes sir.

Q. The only difference being that prior to 1895 the whole portion of the street improved was considered as an entirety and the cost of the whole was distributed on all the frontage, and after 1895 each block was taken as a separate proposition and the cost of each block separately assessed on the property abbutting on that one block?

A. Yes sir.

Q. Can you state what the improvements made and paid for in Westport and paid for according to this basis of apportionment amounted to?

A. I could not say without looking at the books. It is quite a large sum though, two or three hundred thousand dollars.

Redirect examination by Mr. FIELD:

Q. Now Doctor you are certainly mistaken about $200.000.00 improvements being made under this law of 1895, the one under which these three pavements were laid?

A. I do not know whether there was that much but there was quite a large sum in the last few years Westport was in existance.

Q. Well these three pavements were the largest amount of work done under the charter of 1895?

A. Well I think these three streets amounted to over a hundred thousand dollars.

120 Q. Well that is the most of what you did under that charter?

A. No sir. 32nd street from Main to McGee and two or three blocks of 35th and 36th.

Q. All of those all told don't amount to more than six or eight blocks, all those other improvements? I mean those other improvements outside of these three.

A. They do not amount to more than what?

Q. They do not amount to more than six or eight blocks of pavement?

A. Well 34th street was paved after 1895.

Q. How many blocks is that?

A. That runs from Main to Oak.

Q. Four block-, what else?

A. 32nd street from Main to McGee, that would be seven. And Hunter avenue from Main to Wyandotte and 35th street from Main to Wyandotte.

Q. Well count as you go along,—there is nine, and 35th would be how many?

A. Two, — would be eleven and 36th street was from Main to Wyandotte, that is two blocks, that is thirteen, and I think they paved 36th street from Main to Holmes, that is how many?

Q. About seven blocks.

A. And McGee street. There was only two pieces of asphalt down there I think before the 1895 charter.

Q. Well then answer this one question. Were these three pavements we have in question more or less than the balance that was put down under the 1895 charter?

A. About half of it or perhaps a little more than half.

Q. And they were all paved in the same manner on petition?

A. Yes sir.

Q. And a resolution was introduced after the contractors brought out the petition?

A. Yes sir.

Q. Now Mr. Scarritt has asked you a great deal about fine residences on Main street. I own property between 38th and 39th on Main street and between 39th and Westport avenue on the

121 west side of the street,—I will ask you if there is any fine house in either of those blocks?

A. No sir.
Q. I own property there and other people own it there?
A. I suppose so.
Q. I only own 125 feet between 38th and 39th,—now all those fine houses you have described are north of my property on Main street?
A. Yes,—that is if you do not own north of 38th.
Q. They are all north of 38th?
A. Yes, except on the east side of the street.
Q. Now there is no fine house on the opposite side of the street to my property?
A. Well L. D. H. Russell's house is a good house, a two story and a half slate roof.
Q. A two thousand dollar house?
A. Yes, more than that, I do not think less than $4500.00.
Q. Well what other house?
A. Northeast corner of 39th and Main.
Q. About a three or four thousand dollar house?
A. Yes sir.
Q. Now how far is that property of mine from,—I am at 38th street,—from the center of Kansas City?
A. From Ninth street it is three miles.
Q. Not within walking distance of any business part of Kansas City?
A. Well there is pretty good business right there within a block of it.
Q. That is suburban business and the car barn is within half a block of it?
A. Yes sir.
Q. Do you think that any business property could be put up on my property?
A. I heard a man talking about it if he could get a livery stable in there he would like mighty well to get it.
Q. Well would it cover 255 feet of ground?
A. No sir. I would not put a livery stable there myself if it was mine.
Q. Would it bring two per cent. on the investment?
A. The rents are pretty good on the houses that are there,
122 but I do not know what per cent. they pay.
Q. There is no business house on my side of the street?
A. There is a little confectionery.
Q. An old street car?
A. Yes, sir, at the corner of 39th and Westport avenue.
Q. That is south of me?
A. Yes sir.
Q. And these business houses you speak of are not opposite me but two or three hundred feet south of me and at the terminus of the railroad?
A. Yes sir.

Q. And the car barn is on the opposite side of the street and thes business houses are at the terminus of the railroad?

A. Yes sir.

Q. And you cannot suggest any improvement that I could put o there that would bring me two per cent. on the investment?

A. No sir.

Q. My property fronting on that barn would not be desirable a residence property, would it?

A. I do not think it would be as desirable as some other.

Q. You would not want a residence fronting on a car barn?

A. Not if the car barn would stay there.

Q. And as I understood you I had a very good pavement there

A. Yes sir.

Q. Cost two dollars a foot?

A. Yes sir.

Q. Assessed against the property?

A. Yes sir.

Q. And this property fronting on Wyandotte street also had tax bills issued against it for the pavement before the asphalt was used?

A. Yes sir.

Q. About two dollars a front foot?

A. Well I do not think that much. That was one of the cheapest contracts for paving the city ever made.

Q. It was not worn out?

A. No sir.

123 Q. When this contract for paving with the Barber asphalt was made?

A. No sir,—there was some dirt over it.

Q. Now at the time this street was paved on Baltimore avenue I will ask you how many people had houses fronting on that pavement?

A. There was Mr. Keith.

Q. At that time in 1897?

A. Mr. Keith and Mr. Shelley at the corner of 36th and Baltimore; Mr. Beedle and Mr. Cook and Mr. Schoonamaker, and there was Mrs. Clark, Herbert Mills and Frank Groves and Frank Wornall and John D. Wornall at the corner of 39th and Baltimore and there were three frame houses on Baltimore between 39th and Westport avenue and the Baptist church.

Q. Doctor you are not counting those for me.

A. I think that is the whole number of houses there at that time.

Q. Now what was the distance on Baltimore avenue paved under this ordinance of 1897?

A. Nearly a mile. Thirty-ninth to Thirty-first is just a mile and the distance from 39th to Westport avenue would carry it over.

Q. Just approximate it the best you can Doctor, what would you say was the length of the pavement on Baltimore avenue? There were whole blocks on both sides of Baltimore avenue in 1897 that did not have a single house on it wasn't there?

A. Yes sir.

Q. There was no house on the east side of Baltimore avenue from Westport avenue to 36th avenue, was there?
A. Yes, there were two houses and the Baptist church.
Q. Just count them, how many were there on that east side?
A. Well there was the Baptist church,——

By Mr. SCARRITT:

Q. What did that cost?
A. That cost about forty or fifty thousand dollars.

By Mr. FIELD:

124 Q. Don't go over it that way Doctor, just count them in your mind and give them.
A. I did not call this place of Hall's.
Q. I will ask you if the greatest part of the land and lots on Baltimore avenue were not vacant and unimproved at the time this street was paved?
A. Yes sir.
Q. A very large majority of it?
A. Yes sir.
Q. Now I will ask you if that was not also true of Main and Wyandotte streets at the time these pavements were laid?
A. Well I do not know on Wyandotte. That was perhaps nearly an even thing, but on Main street there was a large amount of vacant property.
Q. Now the city had never macadamized Main street north of 38th?
A. No sir.
Q. The county put in some kind of work that was very inferior?
A. Yes sir, very inferior.
Q. That was where the bulk of this pavement was laid?
A. I do not understand that.
Q. Now up where these fine houses are that you testified to, that is where the bulk of the base of this pavement had to have rock put in?
A. From 36th to 39th it was the old macadam put down by the county and that was badly washed out, and from 31st to 36th Westport macadamized it?
Q. Particularly between 36th and 38th don't you remember how badly it was washed out?
A. Yes sir.
Q. It was much better south of 38th?
A. Yes sir.
Q. Now Doctor I do not know whether I quite understand you about the delivery of those tax bills, about the way you kept them and did not hand them over before Westport was taken into Kansas City. You did not have time to register them. Did you deliver the Baltimore Avenue paving bills to the Barber Company at the

same time you delivered the Wyandotte Street bills?
125 A. I think I took the receipt at the same time.
Q. Did you hand them over at the same time?
A. I could not say. We went on and registered the bills and when we got them registered we delivered them as fast as we could.
Q. Now Mr. Scarritt got something out of you that you were keeping these bills for the Barber Asphalt Company,—had they ever been handed over to the Barber Asphalt Company?
A. The bills were there and I took their receipt for them.
Q. Had you passed them over to them?
A. There had been a delivery.
Q. Did you say "Here are your bills"?
A. I said "Here are your bills." They were laying there on the table.
Q. Did you have them in your hands?
A. I do not think I had them in my hands.
Q. You did not finish them, they were not registered,—I will ask you to look at section 3 of the ordinance levying the taxes and see if that did not require you to register them before delivering them?
A. Section 3 requires said tax bills shall be registered by the city clerk in his office and shall by him be delivered to the parties in whose favor they are issued and he shall take the receipt of such party or parties for all claims against the city on account of such work.
Q. Now Doctor was it because of that provision in that ordinance that you held those tax bills?
A. It was necessary to register them.
Q. Before you delivered them?
A. I do not know that it was.
Q. Was that the reason you held them?
A. The reason they were not registered they were not entered on the tax bill lien record.
Q. Well you had not complied with this section 3 you have read. I will ask you again, Doctor, if the reason you did not turn over these tax bills is this section 3 requires you to register these
126 tax bills before they were delivered, does it not?
A. It does not say so, does it?
Q. Well why didn't you turn over the tax bills to them if they were then entitled to them?

Counsel for defendant objects to the question as leading and calling for the conclusion of the witness on a point of law.

A. I wanted to register the tax bills and that was required under the ordinance.
Q. Before they were delivered?
A. Before I delivered the bills, yes.
Q. Well you had not registered them before Kansas City extended the limits and took in Westport?
A. I do not think we had.

Q. Don't you know you had not?
A. Well I say there were a whole lot of them and I did not keep a tab of them but I am satisfied that they were not delivered until after the second of December.
Q. Why don't you remember that these tax bills were not delivered until after the second of December?
A. They were not out of the office until after the second of December.
Q. They were in your control?
A. Yes sir.
Q. And you had not turned over those tax bills to the Barber Asphalt Company?
A. I had taken their receipt.
Q. But you had not turned them over?
A. I had not turned them over to them.
Q. I mean on Baltimore avenue and Wyandotte street.
A. I mean on both of them.
Q. Doctor I believe that is all.

Not being able to complete the taking of these depositions on this day by and with consent of parties complainant and defendant to this action I adjourn the further taking thereof until tomorrow then to be resumed at the same place and within the same hours named in the caption hereof.
Given under my hand and notarial seal February 14th, 1900.

ALFRED FIDLER,
[SEAL.] *Notary Public, Jackson County, Missouri.*

127 Pursuant to adjournment as above stated on this 15th day of February, 1900, between the same hours mentioned in the caption hereof, counsel for the parties plaintiff and defendant being in attendance, I resumed the taking of said depositions at the same place mentioned in the caption hereof, as follows:

GEORGE L. LOVE, of lawful age, being produced, sworn and examined as aforesaid, in continuation of his deposition commenced yesterday further deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. You were testifying yesterday about Main street,—I will ask you what is the width of Main street south of 38th street?
A. I think it is eighty feet. I am not positive though.
Q. Is the street any wider at the north end?
A. Yes, it is wider from Hunter avenue or 33d street to 31st.
Q. Well that was two blocks of the pavement on Main street in question?
A. Yes sir.
Q. Well how much wider is the street up there between 31st and 33d?

A. I think it was 99 feet, that is my recollection.
Q. The asphalt pavement then was wider, was it?
A. I think it was. I will add to that, under the general ordinance providing for the width of sidewalks.

Cross-examination by Mr. SCARRITT:

Q. Don't you remember, Doctor, that there was a special ordinance establishing the width of the sidewalks on that street?
A. No sir, between 39th and Westport avenue there was a special ordinance establishing the width of sidewalks there, but I do not remember any other.
Q. You would not say that the asphalt pavement was wider in one portion of the street than in another?
A. I would not like to testify to that without looking at it, but it is my recollection it is a little wider from 31st down to 33d street.

128 Q. When the engineer advertised for bids for asphalt pavement state whether or not there was more than one bidder?

A. I think there was. I had nothing to do with receiving the bids.
Q. Do you know who else bid besides the Barber Asphalt Company?

By Mr. FIELD:

Q. Do you mean for this particular work?

By Mr. SCARRITT:

Q. Answer the question.
A. I understood that the Parker-Washington Company bid on this work.
Q. That company laid some pavements in Kansas City, did they not?
A. I have heard that they did.

By Mr. FIELD:

Q. Did not you also hear that the Barber Company chased the Parker-Washington Company out of business here on the ground that they could not furnish Trinidad Lake asphalt?
A. I only know it from hearsay.
Q. Well about any other party bidding, you only know that from hearsay?
A. No, I really have knowledge of their bidding there.
Q. Did they bid for one of these three pavements?
A. I have a recollection, I think they bid, I think it was on Main street, it was not in my office. I saw McCormick there and I heard quite a little row in the engineer's office at the time the public improvement committee and engineer awarded the work.

Q. Was the reason of the row because McCormick thought he was entitled to the work on the ground that he had bid less than the Barber?

A. I think the row was over the ability of the Parker-Washington Company to furnish the Trinidad Lake asphalt.

Q. And the committee decided that the Parker-Washington could not furnish the Trinidad lake?

A. I suppose so.

Counsel for the defendant moves to strike out the answer of the witness as being his mere opinion.

Q. I will ask you if your answer to Mr. Scarritt's question as to the Parker-W[illegible]agton making any bid was not also a matter of opinion?

A. I had no special knowledge of their making a bid.

Q. Which one of these pieces of work did they bid on?

A. I think it was Main street.

Q. No others?

A. I do not know whether there were any others or not.

Q. But you heard quite a row between McCormick of the Parker-Washington and the committee because he could not get the work?

A. Yes sir, the only thing I heard the row about was his ability to furnish the material.

Q. Was it after the work was awarded?

A. I think it was at the meeting to award the contract.

Q. Wasn't the tenor of that conversation to the effect that the committee refused to consider his bid at all on the ground he could not furnish Trinidad Lake asphalt?

A. That is my understanding.

Q. Well you heard the row, did you?

A. Yes sir.

Counsel for defendant moves to strike out the answers of the witness as being his conclusions and mere opinions and secondary evidence.

Q. You said yesterday, I believe, if I understood you right, that these contracts of street pavements in question were not signed by the city engineer until after the ordinance confirming the contract?

A. Well I did not intend to state it that way if I did.

Q. Now, Doctor, was there any ordinance of Westport to your knowledge authorizing the engineer to sign this contract before he signed it?

Counsel for defendant objects to question as not calling for the best evidence.

A. How is that?

Q. Why was this contract confirmed, was it because the city engineer had no previous authority to sign it?

(Same objection.)

130 A. The general ordinance establishing the office of city engineer and defining his duties, etc. provided that the engineer should sign all contracts on the part of the city and report them to the board of aldermen for confirmation.

Q. I will ask you if each of these three contracts did not provide that it was entered into by the engineer subject to the approval of the board of aldermen?

A. Certainly, that was in each contract.

Q. So that these contracts, as I understand you, were signed by the city engineer when they were brought to the board of aldermen for approval?

A. The contracts were signed and filed with the ordinance to confirm the contracts and they were filed with me all together.

Q. Signed by the city engineer on behalf of the city of Westport?

A. Yes sir.

Q. And the question of their becoming binding was left to the board of aldermen by an ordinance confirming the contracts?

A. Yes sir.

Q. And the ordinance confirming each of these contracts was introduced and passed after the signing of the contracts by the city engineer on the part of the city?

A. Yes sir. There is one other point that I think maybe I may have been wrong on in the testimony yesterday, that is a matter of statute though. That is as to the pro-rating of cost of intersections. I believe I said that each block took care of itself. I do not know whether that was a matter of fact or not, but I know that the intersections were pro-rated on the blocks where they touched. Whether it is so where there is a difference in the width of the street I would not say.

Q. Do you remember how these assessments were apportioned? Was that done by the board of aldermen or was the cost of each piece of work done computed by the city engineer and did
131 the board of aldermen adopt his report?

A. It was done by the engineer, he made an estimate of the total cost of the work and the amount of frontage on each street and the amount assessed against each piece.

Q. And the council just adopted his apportionment?

A. Yes sir.

Q. The council did not give its personal attention to that matter?

Counsel for defendant objects to the question as calling for secondary evidence when the records of the council are primary evidence.

A. No sir.

Q. You copied these ordinances I read in evidence here for me, didn't you, Doctor?

A. Yes sir, I believe I did.

Q. For Main street, Baltimore avenue and Wyandotte street?
A. Yes sir.
Q. Resolution and ordinance in each case?
A. Yes sir.
Q. Were they correctly copied?
A. Yes sir, they were correctly copied.
Q. That is all.

G. L. LOVE.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this 20th day of March, 1900.

[SEAL.]

ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

JOHN C. TATE, of lawful age, being produced, sworn and examined on the part of the complainant deposeth and saith as follows:

Direct examination by Mr. FIELD:

Q. Did you reside in Westport in 1897?
A. No sir.
Q. It was before that you resided in Westport, was it?
A. It was before 1894.
Q. Where did you reside in 1897?
A. In Kansas City.
Q. Do you remember the matter of the Barber Asphalt
132 Company paving Main street and Baltimore avenue and Wyandotte street in Westport, Missouri, in 1897?
A. Yes sir.
Q. I will ask you if a day or two after Kansas City made its extension taking in Westport, namely a day or two after December 2nd, 1897, if you were in the office of Mr. Love who had been city clerk of the city of Westport?
A. I was.
Q. I will ask you if you saw the tax bills that were made out in favor of the Barber Asphalt Company for the paving of Wyandotte street in question?
A. Yes sir, I saw them being entered up on the Westport tax bill register.
Q. Did you see the tax bills also there?
A. I saw some tax bills on Wyandotte street.
Q. Purporting to be issued to whom?
A. The Barber Asphalt Company.
Q. For the 1897 paving?
A. Paving that had just been completed on Wyandotte street.
Q. Was that after Kansas City had taken in Westport into its limits?
A. Yes sir.
Q. You may take the witness.

Cross-examination by Mr. SCARRITT:

Q. You say, Mr. Tate, that someone was entering these bills on the tax bill register of Westport?
A. Yes sir.
Q. The bills then had been completely executed and signed and the notation of the bill was being put on those records?
A. The bills were being entered up in the tax bill register.
Q. That is a book kept by the city clerk out there?
A. Yes sir.
Q. Do you remember who was doing that work?
A. I think it was Mr. Abercrombe's sister.
Q. A young lady there?
A. Yes sir.
Q. Was she working for the city clerk or man who had
133 been city clerk of Westport?
A. I do not know whether she was working for Abercrombe or the man who was city clerk. I think that would probably come under the engineer's department.
Q. She had these completed bills and was making a memorandum of each one in the registration book.
A. Yes sir.
Q. That is all.

Re-direct-examination by Mr. FIELD:

Q. In whose office were these tax bills? In the city clerk's office?
A. Yes sir.
Q. George L. Love?
A. Yes sir.
Q. Are you sure that this was after the city extension taking in Westport?
A. Yes sir.
Q. Was any member of the Barber Asphalt Company present at the time?
A. Not that I recollect.
Q. I will ask you whether or not the ex-city clerk, George L. Love was engaged in work for ten days or two weeks after the extension entering tax bills on that record?
A. He was engaged for fully a week.
Q. You are Mr. Mastin's agent and were looking after assessments and re-issues of tax bills?
A. Re-issues of tax bills is what I was looking after specially.
Q. There had been some tax bills defeated and the Westport aldermen just prior to the extension had ordered them re-issued?
A. Yes sir, a large number.
Q. And after the extension you went out there to see if all had been reissued against Mr. Mastin's property?
A. To get a record of all that had been reissued.

Q. Were you a member of the board of alderman in 1891 and '2 of the city of Westport?

134 A. I think I was in 1893 and '4, but not in 1891 and '2.

Q. Do you remember the pavement of that block from 39th to Westport avenue on Main street by Graham?

A. Yes sir.

Q. Do you remember the condition of the pavement in question at the time the Barber Asphalt Company laid on the paving in question?

A. Yes, it was in good condition. That block of ground was really the best paved portion of the macadamized streets of Westport.

Q. The macadam was 12 inches deep?

A. I think it was deeper than that. The rock was put in in wet weather and was travelled over by wagons and thus became thoroughly packed.

Q. Now are you familiar with the property fronting on Main and Wyandotte streets and Baltimore avenue at the points paved in 1897 in question?

A. Yes sir.

Q. I will ask you whether on either of those streets the majority of the frontage was improved or vacant and unimproved?

A. The majority of the frontage was unimproved at that time and is so still.

Q. You may take the witness.

Re-cross-examination by Mr. SCARRITT:

Q. What date was it, Mr. Tate, that you were in the clerk's office to which you refer?

A. I was there the day after the election.

Q. Was that the third of December?

A. Yes, the election was on Tuesday the second, I think it was, and I was there practically every day for a week after that.

Q. What day was it that you recollect seeing the Wyandotte Street bills?

A. That was the day after the election.

Q. On the third of December?

A. Yes sir.

Q. Did you see them after that day?

A. I would not be sure about that.

Q. You were there, as I understand it, to look through the

135 tax bills to see what bills there were affecting your client's property?

A. I was looking after reissued bills especially. This matter of Wyandotte street came up incidentally and the matter was impressed upon my mind by telling Judge Field who was in our office that I had seen these bills just being entered up and that is how the matter came to be impressed upon my mind.

Q. Did you look through all the bills out there?

A. No sir.

Q. Main street along the distance improved with the asphalt pavement referred to in this case is one of the handsome residence districts in Kansas City, is it not?

A. Yes sir.

Q. Are some of the finest residences of the city situated on it?

A. Yes sir.

Q. Slavens' residence is a handsome structure?

A. Yes sir.

Q. Major Warner's residence,—the United States district attorney?

A. Yes sir.

Q. Judge Ellison of the court of appeals?

A. Yes sir.

Q. Robert Taylor has a handsome residence there?

A. Yes sir.

Q. Mr. Mastin has a very handsome residence?

A. Yes sir.

Q. Mr. R. R. Conklin of the United States Trust Company had his residence on that street?

A. The residence he formerly lived in was on that street.

Q. He built it?

A. Yes sir.

Q. It is developing into one of the best residence districts of the city?

A. It is developing slowly. The street has a future to it.

Q. And was very much improved as a whole by this asphalt pavement wasn't it?

A. I think so.

Q. Baltimore avenue has some fine residences on it? Mr. Keith's house is one of the handsomest residences, isn't it?

A. Mr. Keith has a handsome residence and there are a number of others on the street costing from five to ten thousand dollars.

136 Q. Mr. Keith's residence cost more than that?

A. I understood it cost $25.000.00.

Q. It cost more than that?

A. I understood it cost that.

Q. The Baptist church is on that street?

A. Yes sir.

Q. One of the most costly churches in the city?

A. No sir.

Q. Now Wyandotte street, isn't that developing into a fine residence district?

A. Well the course of developement out in that country is all of it very slow. There are quite a number of good houses on Wyandotte street and a number have been erected in the last two years.

Q. Baltimore avenue along the distance paved was improved generally, was it not, and the property fronting on Baltimore avenue, by this paving?

A. Yes sir.

Q. It was in a poor condition before the paving was put down?
A. Yes it was a dirt road before this was put down.
Q. And since it has been put down it has been quite a beautiful thoroughfare?
A. Yes sir.
Q. Now Wyandotte street, the same can be said of that?
A Wyandotte street was paved with macadam?
Q. I asked you as to the condition of the roadway and as to its being first class property and if the paving along the distance improved has materially enhanced it in value?
A. I think that Wyandotte street has been benefited considerably by the asphalt paving.
Q. Your client owned quite a large amount of frontage on each of these streets, didn't he, Mr. Tate?
A. Yes sir.
Q. And didn't you favor the improvement of the street as made?
A. Yes sir.
Q. Didn't your client petition the board of aldermen to cause the work to be done?
A. Yes sir.
Q. Now isn't your client the owner of a large portion of the
137 unimproved property on these streets?
A. He owns a large part of the unimproved property.
Q. Now wasn't it your idea and your belief and his that by the paving of these three streets the abutting property would be brought into the market and rendered more salable?
A. That was the idea.
Q. Wasn't it your belief that the value to be added to the unimproved property by making the improvement would be greater than the cost of the work?
A. Yes sir.
Q. At the time your client executed the petition for the work was it not understood and was it not expressed in the petition that the work should be paid for by special assessments to be levied and charged against the abutting property according to the frontage as prescribed by the charter of Westport?
A. That is my understanding of the petition.

Re-direct-examination by Mr. FIELD:

Q. Your client's estate was in the hands of a receiver at the time of the signing of this petition?
A. Yes sir.
Q. His idea and yours was if he could get asphalt laid in front of it it would enable him to pay his debts by selling property?
A. Yes sir.
Q. You say property is selling slowly out there?
A. Yes sir.
Q. Has property sold out there for less than it was sold before?

A. There was one piece that has sold for more since the paving and that was the Taylor property.

Q. That is a very high sightly place, is it not?

A. Yes sir.

Q. You know my property out there, do you not?

A. Yes sir.

Q. My property is not the same class of property as the Taylor property?

A. No sir, it is not in the same class.

Q. My property is in a sort of a draw between 38th and
138 '9th on Main. It is on the west side of Main and west side of Baltimore.

A. Yes there is quite a depression in that particular locality.

Q. And you say my property is not such a class — property as the Taylor property?

A. No sir.

Q. What would you say would be the difference in value per front foot between my property and the Taylor property?

Counsel for defendant objects to the question as immaterial.

A. Your property on Baltimore would not sell for within thirty to thirty-five dollars a foot of as much as the Taylor property. The property on Main would be probably twenty to twenty-five dollars a foot lower in value. The Taylor property is on the corner of 35th and Main.

Q. This property of mine you say on Main is worth from $20 to twenty-five dollars a foot less than the Taylor property?

A. Yes sir.

Q. Now take the property on Baltimore avenue there between 37th and 38th Mr. Mastin owned that was bought by Finlay,—was that bought by Finlay since the paving of Baltimore avenue?

A. Yes sir.

Q. I will ask you whether that property sold to Finlay sold for as much as property had sold for previous to the pavement?

A. Well the property sold to Finlay for twenty-five dollars a foot. It had previously been sold some seven or eight years before at about $44 per foot.

Q. The same property?

A. The same property. That is the price Mr. Mastin paid for it.

Q. You can take the witness.

Recross-examination by Mr. SCARRITT:

Q. Isn't it true, Mr. Tate, that values of properties generally,—I mean outside property such as this, at the time Mr. Mastin bought that property, were they not a great deal higher than they
139 were after the Kansas City boom was over?

A. Yes sir, a great deal higher.

Q. I will ask you if a great deal of that outlaying property was

not worth less than 1/10th in 1895, '6 and '7 of what it was in 1887?

A. None there that I know of.

Q. I am referring to outlying tracts generally about Kansas City?

A. If you w nt to go out to farm lands and take them in they probably did depreciate seventy-five to ninety per cent., but you take property located like that is and that particular property there is no such depreciation as that.

Q. I will ask you if in the last three or four years there has not been an immense amount of asphalt paving laid in and about Kansas City?

A. Yes sir.

Q. Whether property owners have not caused their streets to be paved largely on the theory that you and your client caused yours to be paved and thereby increased the supply of choice residence property?

A. Well that question is too general. I know of a number of cases where parties have petitioned for the work and wanted it done but I could not say the majority of work was done because people wanted it done.

Q. Well I say it has pretty generally been acted upon here in the last three or four years to put the street in first class condition in order to improve the property?

A. There has been a great deal of paving done in residence neighborhoods.

Q. And that has made quite a large supply of vacant property on well paved thoroughfares?

A. Yes sir.

Q. In other words there has been a great deal of competition to sell by owners of choice residence lots to prospective buyers?

A. Yes sir.

Q. That is all.

Re-direct-examination by Mr. FIELD:

140 Q. Has there been any competition here in Trinidad Lake asphalt that you have heard of?

A. Yes, the McCormacks or Parker-Washington Company have tried to get some contracts from the city.

Q. They have tried but did they succeed?

A. I think several contracts were let to them.

Q. How many?

A. There were several of them let to them over on the west side.

Q. Any in Westport that you know of?

A. No sir.

Q. The Barber has done all the paving out there?

A. Yes sir.

Q. Now do you know that the Barber Company has contended that the Parker-Washington could not furnish Trinidad Lake asphalt?

A. Well my information is general on that, what I have read in the papers,

Q. Well do you know that the Parker-Washington has been chased out of business by the Barber Company?

A. That is the impression I have.

Q. Do you know how they get the council to pass on the necessity of this work, or do they go after the work themselves?

A. They generally circulate a petition among the property owners asking the council to pave the street with their material.

Q. That is with the "Trinidad Lake" with the idea the street is going to be paved?

A. Yes sir.

Q. Do the Barber people attend the council meetings when they are going to do anything about ordering work?

A. I cannot say in Kansas City but I know they did at Westport.

Q. They had representatives at the Westport aldermanic meetings?

A. I have seen their representatives there at a number of meetings.

Q. I will ask you if the Barber is not quite a politician?

A. Hugh McGowan has that kind of a name.

Q. Fixing councils and boards of aldermen and getting
141 work of that kind?

A. I would not say he was a "fixer" but he has the reputation of getting contracts.

Q. Well I will ask you if it is not a well known fact that the Barber Company is a political factor that has to be recognized here?

Counsel for defendant objects to the question as immaterial and incompetent and calling for the conclusion of the witness and for hearsay evidence.

A. I have no direct knowledge that that is a fact.

Q. Isn't that the general understanding, Mr. Tate?

Counsel for the defendant makes same objection as just above.

A. That is the general impression.

Q. I will ask you if they do not keep a regular staff of lobyists to attend municipal bodies that let public work or street pavements?

A. I do not know.

Q. Well was that the case while you were in the council at Westport?

A. When I was in the council of Westport there was no asphalt paving done. Since then I have had occasion to attend some of the meetings of the Westport council, especially along in 1897, and have seen Hugh McGowan, Jim McGowan and another representative,——

Mr. Mr. Getty?
A. No.
Q. Norris?
A. Yes, Norris, Mr. Norris there.
Q. I believe that is all.

Re-cross-examination by Mr. SCARRITT:

Q. You have seen a great many property owners there too, have you not?
A. Yes sir.
Q. Now these persons connected with the Barber Asphalt Paving Company represent to the property owners, do they not, that they have the best paving material known?
A. Yes sir.
Q. And isn't it a matter of general belief among the people
142 of Kansas City that they have the best paving material known?
A. Well that is a question I do not know about. Up to a few years ago it was thought that they had decidedly the best material but recently I have heard the Gilsonites spoken of in very high terms. What the general opinion is I do not know.
Q. Well there have been at least four companies laying asphalt pavements, with extensive plants, laying paving in the last five or six years?
A. I think so.
Q. Isn't it a fact that the Barber Company laid 367.000. yards against the Gilson Company's 10.000?
A. I do not know what the proportion was. I simply know that the Barber laid more pavements than any of the other asphalt companies.
Q. The Barber Company is the paving company which has been here longest, is it not?
A. Among the asphalt companies?
Q. Yes.
A. Yes sir.
Q. They have pavements that are 13 years old laid here, have they not?
A. I do not know how long the pavements have been down, some of them a number of years.
Q. Wyandotte street in Kansas City was paved in 1887, was it not?
A. I do not know.
Q. Well is it not true that those streets laid by the Barber Asphalt Company have been maintained by the company all these years without a cent of expense to the property owners or the city at large?
A. What work they have done has not cost the property owners anything, but all the streets they have put down are not maintained in good order by any means.
Q. Have they ever been paid by the city?

A. Not that I know of.

Q. Now haven't these persons connected with the Barber Company told the people of these pavements enduring ten or fifteen years without any cost of repairs?

A. I do not know what they told the citizens.

143 Q. Is not that one of the arguments in representing the interests of the paving company?

A. My recollection is that some of their contracts call for ten years' maintenance—most of them about five. It is supposed that the pavements will last quite a while.

Q. That is ten years' pavement without expense to the property owners or public?

A. Yes sir.

Q. Mr. Tate having been in the council at Westport and being a property owner and representative of very large property interests in Kansas City, I will ask you to tell us whether it is not true that no contract has been entered into by Kansas City for the laying of Trinidad Lake asphalt pavement except upon the written petition or request of the majority of the resident property owners that are to be taxed with the cost of the work?

A. That is something I do not know. I am inclined to think that some streets have been paved as business streets which the property owners did not want paved with asphalt.

Q. How about the other streets?

A. Well my impression is the other streets were probably petitioned for.

Q. Well by the charter of Kansas City is it not a fact that more than two materials are always designated and the property owners given the right by petition to select which material it shall be paved with?

A. On business streets, yes. That question was limited to business streets, or intended to be.

Q. So even on business streets when Trinidad Lake asphalt has been used it has been on the petition of the majority of the resident property owners?

A. Yes sir.

Q. That is all.

Re-direct-examination by Mr. FIELD:

144 Q. Mr. Scarritt has asked about three asphalt plants here,—what are they, or were they in 1897 at the time of these three pavements? What three plants laid Trinidad Lake asphalt that we had here? Now "Trinidad Lake" I am talking about.

A. I think at the time there were only two, the Parker-Washington and the Barber.

Q. Well the Parker-Washington was chased out of town by the Barber on the ground that it could not furnish the Trinidad Lake?

By Mr. SCARRITT: They have been working right along.

By Mr. FIELD: You ran them out of town and you know it.

A. That is my impression.

Counsel for the defendant moves to strike out the answer of the witness as not a statement of fact but a mere impression.

Q. Well you know as much about that, you have as much actual knowledge as you have about the matters you have answered in reply to Mr. Scarritt's questions, haven't you?

Counsel for the defendant objects to the question as argumentative and calling for the conclusion of the witness.

A. I will say yes to some of his questions,—not to all of them.
Q. The Gilsonite Company never laid any Trinidad Lake here that you understood, did they?
A. Not to my knowledge.
Q. They have a different pavement, haven't they?
A. Yes sir.
Q. Bituminous rock?
A. Yes sir, said to be gotten from the Indian Territory.
Q. And you understand it to be a very good and useful brand of asphalt, do you?
A. Yes sir.
Q. Mr. Scarritt asked you about a number of residences out on Main street, the Taylor residence and Slavens residence,—I will ask you if those fine residences were on the street at the time the street was paved with asphalt?
A. Some of the residences he has mentioned were on the street before and some have been built since.
145 Q. Well the Slaavens residence and Taylor residence?
A. They have both been built since 1897.
Q. Before 1897 Mr. Mastin had his residence there?
A. Yes sir.
Q. And Major Warner's frame residence was there?
A. Yes sir.
Q. Now what other residence was on Main street at the time of these pavements?
A. There was only one there and that is the Conkling house.
Q. That was built several years before?
A. That was built about 1890, I think.
Q. Now this locality out there where my property is, I will ask you if that has not been among the occasional localities that depreciated below the price of 1887 less than almost any part of the city? In fact all that territory out there on those pavements where the property was very high in 1887, I will ask you if that property before the pavements in question had not depreciated less than any other property in the city?
A. Yes sir, I think so.
Q. They had fine street car lines out there?
A. The best system in the city.

Q. And I will ask you if it was not that cable system more than anything else that maintained the values out there?

A. I think so.

Q. You can get out there better than to almost any other part of the city?

A. Yes sir, without any change.

Re-cross-examination by Mr. SCARRITT:

Q. You cannot give an opinion as to the relative merits of Indian Territory asphalt, rock asphalt as it is called, and Trinidad Lake asphalt, as it is called, can you?

A. No sir.

By Mr. FIELD:

Q. How long has the Gilsonite Company been paving with their asphalt here?

A. I think about three years.

Q. The wear and tear on that is as little or less than the
146 Trinidad Lake, hasn't it been, Mr. Tate?

A. Their pavement seems to be a harder pavement and from what I have seen of it it would probably last longer than the others that I have seen. There is less oil in it.

Q. The Gilsonite Paving Company had a plant here for paving streets at the time these streets were paved in 1897?

A. I think so.

By Mr. SCARRITT:

Q. Do you remember the Gilsonite Company having paved the block on Grand avenue between 19th street and the Belt railroad in this city?

A. It was between Twentieth and the Belt railroad, yes sir.

Q. Do you remember that was laid in the fall and the spring first following they tore up the whole east half of that pavement?

A. I remember distinctly.

Q. And do you remember that in the fall of 1899 they tore up and relaid the west half of that street?

A. They only tore up part of it, the west half, in spots.

Q. I will ask you if they have not torn up ninety per cent. of that pavement since it was first laid down?

A. No, I would say two-thirds.

Q. I will ask you if the east half of that street has not been laid three times during the last three years?

A. I do not know about that, I know it is a good pavement now.

Q. Well it was relaid the last time within the last three months, was it not, a large part of it?

A. I do not recollect seeing it laid.

Q. Now do you remember of the pavement on 19th street laid by the Gilson Company in this city?

A. Yes sir.

Q. I will ask you if at least one-third of the south half of that street was not torn up and relaid within 15 months after it was laid?

A. I do not know. They relaid some of it, but what pro-

147 portion I do not know.

Q. Quite a large extent?

A. I do not know how much of it.

Q. Now the Gilson pavement consists of a single stratum of the combined rock and oily substance, does it not?

A. Yes sir.

Q. And the Trinidad Lake pavement is laid down in two courses the lower of which is called the binder course, composed of broken stone and Trinidad Lake asphalt, and on top of that what is called the wearing surface, composed chiefly of course sand and the Trinidad Lake asphalt?

A. That is the method of laying.

Q. So the materials and manner of laying it is materially different?

A. Yes sir.

Redirect-examination by Mr. FIELD:

Q. I will ask you if you have not know- of the Barber Company tearing up a great deal of their pavement?

A. I know of them repairing.

Q. Don't you remember of them tearing up the whole of the west side of the pavement on Walnut between 10th and 12th last fall?

A. Now that you recall it I do remember it.

Q. Don't you remember that they had to do Ninth street right here over also?

A. Well they frequently repair the pavement at the junction of Ninth and Main.

Q. And at Eleventh street haven't you noticed a good many gullies in the pavement where puddles of water would gather, I mean East Eleventh street?

A. Well East Eleventh street is laid under their old plan without a binder course and the street is in waves and ridges from about Oak street east.

Q. The Barber laid that, didn't they?

A. Yes sir.

Q. And you find puddles and ridges and waves on other streets they have laid?

A. Yes sir.

Q. And you say they are constantly repairing?

148 A. They are constantly repairing certain streets.

By Mr. SCARRITT:

Q. What proportion of the hundreds of miles of street paving laid in Kansas City by the Barber Company has been relaid?
A. Well I could not say as to that.
Q. About one per cent.?
A. I could not answer that.
Q. There has been about a hundred miles of that pavement laid in this city?
A. I should think so.
Q. And it is all in use?
A. Yes, sir, I think so.

By Mr. FIELD:

Q. They will not let anybody else come here and do any paving, will they?
A. They try to retain their monopoly.
Q. Isn't it generally understood in municipal circles and was it not understood in Westport that the Barber had a monopoly of Trinidad Lake asphalt in this vicinity?
A. I think so, but the Barber Company got the Westport paving from the fact of their paving being petitioned for.

By Mr. SCARRITT:

Q. Mr. Tate you do not want to be understood as saying that the Barber Company has any monopoly of the Trinidad Lake asphalt paving?
A. I think they claim they have themselves.
Q. I am asking you what you know?
A. My knowledge would not be definite on that.
Q. Please answer the question.
(Question read.)
A. I think they have. I think they claim that they have.
Q. Do you know that there are many dozen companies engaged in the paving business that lay Trinidad Lake asphalt?
A. I think there are in different States but my impression is that they are all off-shoots of the Barber Company itself.

Counsel for defendant moves to strike out the answers as the mere impressions of the witness.

149 Q. Do you know that other companies than the Barber Company have laid or pretended to lay Trinidad Lake asphalt in this city?
A. Yes, the Parker-Washington claim to have done it.
Q. That is one of the companies, I suppose, that your impression is as being an offshoot of the Barber Company?
A. No sir.
Q. Do you pretend to know what companies are laying the various asphalts in the United States and the source of their material?
A. No sir.

Q. You do not know a thing about it, do you?
A. Oh, I have heard of companies in different places. I have never studied the question up and have never paid any particular attention to it.

By Mr. FIELD:

Q. Were you present when these petitions for these pavements that you speak of, when they were filed with the city clerk or board of aldermen or city engineer of Westport?
A. I was not.
Q. Do you know who actually presented them there?
A. No.
Q. That is all.

JOHN C. TATE.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this 7th day of April, 1900.

[SEAL.]

ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

Not being able to complete the taking of these depositions on this day by and with the consent of the parties complainant and defendant to this action I adjourn the further taking thereof until the 17th day of March, 1900, the taking thereof then to be resumed at the same place and between the same hours mentioned in the caption hereof.

Given under my hand and notarial seal this the 15th day of February, 1900.

[SEAL.]

ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

Pursuant to adjournment, as above stated, on the 17th day of March, 1900, between the same hours mentioned in the caption hereof and at the same place, counsel for all parties complainant and defendant being in attendance, I resumed the taking of said depositions as follows:

150 W. C. SCARRITT, of lawful age, being produced, sworn and examined on the part of the complainant deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. You are one of the solicitors of the defendant in this case, have principal charge of the cause, I believe?
A. I am one of the firm of Scarritt, Griffith & Jones who are in charge of the case on the part of the defendant.

Q. How long have you been connected with the defendant, Barber Asphalt Paving Company, as attorney and counsellor?

A. Our present firm or its predecessors have represented the Barber Asphalt Paving Company in some of its litigation during the past ten years.

Q. Have you or have you not been the general and principal attorneys in this city in the past ten years?

A. I would so consider it. They had various attorneys and counsellors.

Q. Special attorneys in particular matters?

A. Yes.

Q. Now Mr. Scarritt do you know anything about the resolutions, the first step taken by the board of aldermen of Westport in the ordering of work on the three pavements in question, or on either of them?

A. The question is so general I do not understand the purpose which you seek to inquire about.

Q. I will ask you separately then as to each pavement. Did you ever see the resolution that was passed by the board of aldermen of Westport ordering the Main Street paving? I mean the resolution the first step taken by the board of aldermen?

A. If you refer to the original of the resolution I would say to the best of my knowledge I have never seen it. Of course during the pendency of this litigation the resolution has been brought to my knowledge frequently.

Q. Did you see that resolution before it was introduced before the board of aldermen?

A. To the best of my recollection I never did.

151 Q. Do you know who prepared that resolation?

A. Not to my recollection. I should judge though from my knowledge of the course of these proceedings that it was prepared under the direction of the city engineer of the city of Westport.

Q. In his office or in your office?

A. I could not say.

Q. You could not say whether this resolution which you say was written under the supervision of the city engineer of Westport, was written in his office or in your office?

A. I have no recollection whatever about the matter.

Q. You said a moment ago that it was written under the supervision of the city engineer?

A. Certainly. I said that from my knowledge of the way these proceedings are instituted and carried on; these resolutions are substantially if not exactly all in the same form as to their general provisions. The names of the streets and the distance to be paved of course vary, and there is some difference as to the specifications, that is to say there are different classes of specifications, probably two or three classes, used in Westport.

Q. Well I do not want probabilities, Mr. Scarritt.

A. I give this statement in answer to the question propounded by

Judge Field. He seems to infer from the answer made to the previous question that I might have written the resolution which started this pavement. I desire to say that to the best of my knowledge I did not write it.

Q. Did you write the resolution for either of the other streets, that is Baltimore or Wyandotte?

A. To the best of my recollection I had nothing whatever to do with it.

Q. Who wrote the resolutions on the other streets, if you know?

A. I do not know. I would make the same answer to this as to the other that from my knowledge of the proceedings they were written under the supervision of the city engineer of Westport.

Q. Did you ever see the city engineer of Westport write any of these resolutions?

A. No sir.

152 Q. Were these resolutions shown to you before they were adopted by the board of aldermen of Westport?

A. Not to my recollection. I do not remember ever to have,—scratch that out,——

By Mr. FIELD:

Q. Scratch out nothing. Well do you want to complete that answer?

A. Yes, if you wont interrupt me I will endeavor to complete it.

Q. I have not interrupted you. Please go on and answer the question as fully as you wish.

A. I do not remember to have been present but at one meeting of the Westport board of aldermen and I am very sure that at that time that no resolution or other document connected with these proceedings were shown me.

Q. Well do I understand you Mr. Scarritt as saying that you never saw either one of the resolutions on these streets or for either of these three improvements, before they were adopted by the board of aldermen of Westport?

A. I wish to state most positively that to the best of my recollection I did not. I want to say this, however, that there have been within the last five or six years a great many of these paving proceedings brought to my knowledge at different stages of the proceeding and it is impossible for me to say with absolute accuracy which ones I have seen and which ones I have not seen.

Q. I understood Mr. Griffith to say that he prepared the resolutions for Baltimore avenue and Wyandotte street, in his examination at which you were present the other day, but he did not recall who examined the Main Street resolution. Whose business is it in your office to examine these resolutions, or was it in 1897?

A. If you quote him correctly I assume that what he referred to is the examination of the proceedings of the municipal authorities of Westport by our firm in conformity to their usual custom of so doing in order to advise as to the validity of the contract

153 the company was proposing to enter into for paving work. According to our custom we examine these proceedings after the bids have been received and the work awarded to the company and before the ordinance is passed by the board of aldermen confirming the contract. Mr. Griffith within the last few years has attended to this branch of business almost exclusively and prior to his undertaking it I did most of that work. I have no personal recollection of having examined either of the transactions in question here, and I want to say this, that I had no idea of being called upon to give my evidence in this case until the instant I was sworn and counsel on the other side has never suggested to me that he desired to take my testimony.

Q. Do you think I ought to have told you what I expected to prove by you?

A. I think if you desired to inquire of me as to what I did three or four years ago and you wished to get an accurate statement of it you would have asked me to consult any books or memoranda that we might have preparatory to giving an exact statement, because I assume that you want absolute facts and not conclusions.

Q. I am asking you, Mr. Scarritt, merely for your recollection of whether you saw the resolution adopted by the board of aldermen of Westport for the paving of Main street, or the resolution adopted by the board of aldermen for the paving of Baltimore avenue, or the resolution adopted by the board of aldermen for the paving of Wyandotte street.

A. I think I have answered before, but if not I take pleasure in saying now that I have no recollection of seeing either one of these.

Q. The reason I ask you this is, Mr. Griffith admits to having prepared the resolutions adopted by the board of aldermen for Baltimore avenue and for Wyandotte street, but he does not remember and is pretty sure he did not draw the resolution for Main
154 street. I thought possibly you might know something of the resolution for Main street.

A. As I said before I haven't any recollection.

Q. I have not asked you anything about examining contracts or examining ordinances yet. Do you know whether or not it is the habit in your office, or Mr. Griffith representing your firm and the Barber Asphalt Company, to prepare resolutions for municipal authorities ordering street pabings with Trinidad Lake asphalt?

A. As I said before the resolutions were substantially of the same form. I have discussed the form of these resolutions with the various officials of Westport and Kansas City and a form of these proceedings for both cities has been by custom adopted that is satisfactory both to those in authority and the contractors who bid on these works. I cannot say who has prepared the forms that were used in Westport. Kansas City forms I am quite sure are printed and kept in the form of stationery in the engineer's office.

Q. I asked you, Mr. Scarritt, whether or not it was the habit of your office through Mr. Griffith,—whether or not it was the habit of your office for the Barber Asphalt Company to prepare these reso-

lutions before they were introduced before the board of aldermen of the city of Westport?

A. I cannot say.

Q. Why can't you say?—because you do not know? Is it because you do not know?

A. Yes.

Q. It may be true then that these resolutions for these street pavements for all that you know, were prepared in your office?

A. Judge Field I know in a general way that some of them were prepared by the engineer and that some of them have been prepared by Mr. Griffith. I mean by "prepared" the filling out or typewriting the formal resolution in conformity to the forms in use, to which I have referred in former answers.

Q. As I understand it these resolutions,—or put it this way, the resolution in each case was the initial step taken by the city
155 authorities of Westport for these pavements?

A. My understanding of the initial step, and my understanding is more or less general, is that a petition is signed by a majority of property owners of property fronting on the street proposed to be paved, who are residents of the city, which petition recites the character of the pavement desired and its extent. This petition usually contains the essential parts of the resolution. Upon the filing of such petition with the board of aldermen then a resolution conforming to the prayer of the petition is introduced by some alderman.

Q. Who circulates that petition among property owners for their signatures?

A. That is a matter of which I have no personal knowledge.

Q. What relation did Mr. Hugh J. McGowan and Mr. J. B. McGowan occupy in 1897?

A. Well Hugh McGowan was known as the local agent of the company and if J. B. McGowan was associated with him at that time, he was an employee of Hugh McGowan.

Q. In this work do you mean James B. McGowan was an employee of Hugh McGowan, in this paving work?

A. I mean certainly that he was assisting in his work as agent for the Barber Asphalt Paving Company.

Q. What was Mr. McGowan's work in connection with the Barber Asphalt Paving Company?

A. Hugh McGowan?

Q. Yes.

A. I think his duties covered the whole minutia of securing contracts for work.

Q. Securing contracts from whom?

A. Both the public and private persons who desire asphalt pavements.

Q. Do you know anything about his connection with, or his using as the method of getting work the circulating of petitions among the resident property owners of Westport and Kansas City, Missouri?

A. Yes, one of the most successful methods was that of

156 petition. The petitions state precisely what it was proposed to do and maximum price of the work, the term during which the pavement would be maintained without any cost either to the fronting property owners or the city. The term up to some three years ago was five years and since that time the term of guaranty has been extended to ten years.

Q. You do not mean that there are any ten-year guarantys here?

A. The contracts show for themselves. Of course the agent's work consisted in showing the people what the company would do and the price.

Q. Now Mr. Hugh J. McGowan and his brother James B. McGowan would prepare one of these petitions for the signatures of the property owners and then they would circulate it among the resident property owners and get their signatures and then file the petition with the city authorities of Westport or Kansas City and then the initial step would be taken by the city authorities?—is that correct?

A. The petitions in a great many instances were circulated by the property owners themselves. The agents met the property owners and usually formulated the terms upon which the work was to be done, which is embodied in the petition and the petitions are executed by the property owners and if the majority of the resident property owners have petitioned for the work the petitions are usually filed with the municipal authorities, and then as you suggest in the question the preliminary resolution is acted upon by the municipal authorities. The petition is used for the purpose of bringing to the notice of the property owners exactly what can be done and at what cost.

Q. The thing that I am interested in, Mr. Scarritt, and all that has reverence to my question is the action of these McGowans in procuring these contracts. Do you mean to say the majority
157 of contracts are obtained by petitions that are presented by the property owners to the city authorities in their own proper persons?

A. I mean to say that in my judgment over ninety per cent. of the work done, that is the paving work done both in Westport and Kansas City, has been inaugurated on the petition of the majority of the resident property owners owning property fronting on the street proposed to be improved.

Q. How many instances in Westport and Kansas City do you know where the property owners without any request from McGowan or the representative of the Barber Asphalt Paving Company, where the majority of the property owners of either Kansas City or Westport asked for a street to be paved?

A. Judge I know of a great many instances. As to your streets in question in this suit I have no personal knowledge whatever. My understanding is that the property owners, especially the Mastin interests, which on one or two of the streets seem to own a controlling frontage, in person or through their agents requested the pavements by petitions.

Q. The question of controlling frontage in this case doesn't cut any figure in this suit.

A. My understanding is the majority frontage controls by custom the action of the municipal authorities of Westport in respect to ordering such improvements.

Q. I will ask you if there is anything in the law of 1895 under which these proceedings were had, whether there is anything there requiring any petition or authorizing any petition for a foundation for municipal action?

A. The law speaks for itself.

Q. And how are these petitions, how are the signatures to these petitions obtained?—by the property owners walking up and signing them voluntarily or by the McGowans obtaining them?

A. I have no information whatever as to the streets in controversy in this case.

Q. You have given a great deal of general testimony,—I would like to get the custom.

158 A. I know of a great many cases of property owners circulating them voluntarily in order to get their streets improved.

Q. Will you give a single instance where without any suggestion of McGowans the property owners have taken up the question of having the street improved?

A. Bales avenue from Gladstone boulevard to St. John and Indiana avenue from North's place to St. John. Waldrom avenue from Gladstone boulevard north to Norledge place are such instances.

Q. Any other streets besides those you have named?

A. I do not recollect any now.

Q. You own considerable of this property on the streets you have named?

A. I am interested in it.

Q. Your father's estate and you own a great deal of the property on those streets you have named?

A. I am interested on these streets named and my friends are.

Q. Is that the case with a majority of the paving obtained here?

A. It is in a great many instances.

Q. Then the balance is obtained by the rustling of the McGowans?

A. Not by a great deal. I would say the quality of the pavement and the terms on which it is laid and the terms of the guaranty which have not only been made but lived up to by this company, have been the basis of securing work.

Q. Now you say this Westport board of aldermen used their discretion in considering how much frontage a man represented on a street?

A. I do not think I made any such statement.

Q. As I understand you these resolutions in neither one of these cases were passed until these petitions were filed?—I mean for the pavements in question.

A. I do not pretend to state precisely what occurred in reference to the contracts involved in this suit. I have endeavored to state

in answer to Judge Field's question as to general customs an
practice with reference to the letting of contracts for publ
159 work in Westport.

Q. You stated in a previous part of your examination th
the business of Mr. McGowan as agent of the Barber Asphalt Pa
ing Company was to procure contracts for street paving, I believ
did you not?

A. Substantially so.

Q. Do you know what arrangements he had with the defenda
company as to his compensation for his work?

A. I do not.

Q. Do you know whether Mr. McGowan was in the habit of a
tending the meetings of the board of aldermen of Westport whe
these matters were up?

A. As I have said in answer to a previous question, I do not r
member to have ever attended but one meeting of the board
aldermen during the past four or five years. McGowan was at th
meeting but that is the only meeting of the board of aldermen
the city of Westport that I have any knowledge of his having a
tended.

Q. Where is Mr. Hugh J. McGowan now?

A. He resides at Indianapolis, Indiana.

Q. How long has he resided at Indianapolis, Indiana?

A. About a year.

Q. He resided here in Kansas City at the time of the three pav
ments in question, did he not?

A. Oh yes, he lived here for thirty years I guess, until about th
last year.

Q. What brand of asphalt does the defendant use in street pavin
and has it used since it has been in the street paving business i
Kansas City?

A. If you refer to quality in the term "brand" I would say the
use what is known as the genuine Trinidad Lake asphalt from th
asphalt lake in the island of Trinidad.

Q. There is a distinction, is there not between Trinidad Lak
asphalt and Trinidad asphalt?

A. Trinidad Lake and land asphalt is the usual mark of di
ference.

Q. Is there Trinidad land asphalt in contradistinction
160 Trinidad Lake asphalt?

A. There is a great deal of land asphalt from the island
Trinidad.

Q. Where does the Barber Company get this asphalt?

A. It comes from the lake in the island of Trinidad as I am i
formed.

Q. From the representatives of the company?

A. Yes sir.

Q. From what is called the asphalt lake in Trinidad?

A. Yes sir.

Q. Who owns that? Do you know that from them? I mean that lake.

A. I do not know who owns it. I understand that the Barber Asphalt Paving Company does now own any part of it. The lake according to my information is owned by the Crown of England and there is a concession from the Crown to other parties than the Barber Asphalt Paving Company.

Q. Does anybody else own it except the Barber Asphalt Paving Company?

A. The Barber Asphalt Paving Company has no interest whatever in the lake, so far as I am informed.

Q. The Barber Asphalt Company leaving off the word "paving" is the company that has the interest in the lake itself, is it?

A. No sir, I do not know of any such company as you have named.

Q. Well from whom does the Barber Asphalt Paving Company get its Trinidad Lake asphalt?

A. It purchases it on the market. There are a great many different companies use the Trinidad Lake asphalt, as I am informed and believe.

Q. Who else in Kansas City, as you have been informed and believe, ever had and used Trinidad Lake asphalt?

A. The Parker-Washington Paving Company claim to have had Trinidad Lake asphalt and claim to have used some of it. My information is that it did use some Trinidad Lake asphalt mixed with other asphalts and this mixture it represented as Trinidad Lake; and there was another company that bid on a number of streets, a man by the name of Denison and some one else, who, as I say,
161 bid on Trinidad Lake asphalt specifications and the work was awarded to them, but they never performed their contract.

Q. Do you know why not?

A. No, I do not.

Q. Were they really, these two companies really competitive bidders as against your company for street paving here?

A. They certainly were.

Q. And you say the Denison people were not able to, or at least did not go on with their contracts?

A. I did not say they were not able to. I said they did not.

Q. Haven't you as representative of the Barber Asphalt Paving Company had them contest with the Parker-Washington and the Denison people on their ability to furnish Trinidad Lake asphalt?

A. I have appeared for the Barber Asphalt Paving Company representing them in controversies in regard to letting contracts.

Q. And you have there asserted that these people could not furnish the Trinidad Lake asphalt, haven't you?

A. I have asserted that in the work laid by the Parker-Washington they did not comply with the specifications to use Trinidad Lake asphalt. I do not think that I ever claimed that they could not do it. I never made claim that the Denison people did not lay it.

Q. Do you believe that the Parker-Washington had the Trinidad Lake asphalt to lay on the street pavements for which they bid?

A. I decline to state what my belief is.

Q. Do you remember, Mr. Scarritt, being out at Westport with Mr. McGowan at the time bids for the Main Street paving in question were opened by the city engineer of Westport and the public improvement committee of the board of aldermen?

A. I recollect being out there when bids on some work, some street paving work were opened, and possibly it was the Main Street work. I am not clear as to which work it was.

Q. Who else bid on that work besides the defendant in this case?

162 A. Well at the meeting to which I refer the Parker-Washington Company were competitive bidders with the Barber Asphalt Paving Company and Mr. McCormick was there representing that company. I think he was the president of the company,—I am sure of it.

Q. There was quite a contest between you and Mr. McCormick over that matter, was there not?

A. There was a discussion as to who was the lowest and best bidder, for the work, and in that discussion came up the question of the good faith of the Parker-Washington Company with reference to that work and we discussed at length what the company had done in the past, and the work was awarded to the Barber Asphalt Company as the lowest and best bidder.

Q. Do you remember what the amount of the bid of the Parker-Washington Company was for that work?

A. No, I do not.

Q. Was it more or less than the amount bid by the Barber Asphalt Paving Company?

A. My recollection is it was a trifle less.

Q. Several cents less a square yard?

A. I do not recollect the exact amount.

Q. But your recollection is it was less than the bid of the defendant?

A. That is my impression.

Q. Well don't you recollect that?

A. I say that is my recollection. The Barber Company has a certain price for work of certain specifications and the Parker-Washington Company would usually bid a few cents under the Barber Company's stated price.

Q. How many times did the Parker-Washington Company ever put in a competative bid at Westport?

A. I do not recollect of any other time than that one.

Q. They quit bidding after they were turned down by the committee on that occasion?

A. I say I do not recollect of their ever having bid before or after that for the work.

163 Q. They had circulated no petition for that work?

A. I cannot say.

Q. Did you ever know of them ever having presented a petition to the property owners?

A. Well I have been informed and seen documents that were said to have originated with them that property owners did not pay much attention to.

Q. They have put in a great many bids for street paving in Kansas City?

A. Well I would not say they had put in a great many.

Q. About how many?

A. I would say from recollection a dozen,—my recollection is not worth much.

Q. How many contracts did they get out of the dozen bids?

A. I think they were awarded five or six.

Q. They were awarded one contract for paving Tracy avenue, by the city engineer and public improvement committee?

A. Yes, and I think they were awarded Park avenue and several other streets.

Q. Were those contracts confirmed by the council after those bids were awarded to them?

A. My recollection is suits were brought to restrain the council from awarding the work on the ground that the work had not been lawfully awarded to them and the proceedings came up in two divisions of the circuit court and my recollection is that Judge Slover and Judge Gates held they were illegally awarded. It was on the method of awarding the work that this ruling was made.

Q. Well that was true in the five or six bids they were awarded?—they were prevented by the circuit court?

A. The same fault in the procedure was in all of the contracts that were awarded to them, that is my recollection.

Q. So that they did not get contracts then on these five or six awards that were made to them?

A. They did not get contracts on those awards to which I have referred. They laid two jobs here in Kansas City.

Q. Were their bids lower than the Barber's each time?

164 A. Do you mean every time they bid?

Q. Yes.

A. My impression is Judge they were not. I am not sure about that. I am quite sure they bid higher than the Barber Company at times.

Q. Well was the contract awarded to the Barber when its bid was more than their bid at the same letting in any of these instances where they put in bids?

A. The instances to which I have referred are those in which work was let to the Parker-Washington Company.

Q. I ask you in every instance where the Barber Asphalt Company has been awarded the contract by the committee of the council when the Parker-Washington Company was a bidder if the Parker-Washington Company's bid was not less in amount and cost than the bid of the Barber Asphalt Paving Company?

A. Not according to my recollection.

Q. Is the Parker-Washington Company still bidding on Trinidad Lake asphalt pavement?

A. I do not know about that.

Q. Have you heard of their making a bid on anything here within three years?

A. I understand they are doing considerable paving in Kansas City, Kansas but what material they use I do not know.

Q. Have you heard of their making a bid in Westport or Kansas City, Missouri, for Trinidad Lake asphalt since you had the contest with them out there at Westport?

A. They have not bid in Kansas City recently, but I am not able to state whether they had bid since the date you refer to or not.

Q. You do not recollect any bid by them since then?

A. I do not bear those dates in my mind.

Q. You recollect that occasion?

A. I recollect the occasion.

Q. You had just one round with them at Westport, or did you have more than that?

A. There were no timekeepers or referees.

Q. You haven't had any opposition or competition from them in Westport since this occasion that we have talked about?

A. Nobody has done any paving in Westport since it went out of existance, of course.

165 Q. Since that trouble you refer to have you had any opposition from them in Westport before it went out of existence?

A. I could not state.

Q. I will ask you this question, whether the Barber Asphalt Paving Company or its representatives had anything to do with the opposition to the Parker-Washington getting contracts they bid on which you testified were resisted before the circuit court here?

A. Do you refer to Kansas City work?

Q. I refer to those cases.

A. I decline to answer.

Q. Why do you decline to answer that question, Mr. Scarritt?

Q. Because I think your inquiries into immaterial matters have gone far enough.

Q. You volunteered the information here as to why the Parker-Washington did not get these contracts,—now are you refusing to tell me whether the Barber Asphalt Company had anything to do with preventing them from getting these contracts?

A. I decline to answer the question.

Q. Did The Barber Asphalt Company the defendant in this case have anything to do with the litigation you spoke of in the circuit court preventing the Parker-Washington Company from getting contracts for street paving?

A. I decline to answer.

Q. On what ground do you decline to answer the question?

A. The same reason as before.

Q. Do you decline to answer on the ground it is a professional matter?

A. I have answered that question.
Q. I insist on an answer to the question. Do you remember the contest over Tracy avenue and the mandamus proceeding instituted by the Parker-Washington Company against the mayor and council to award them the contract on their bid on that work?
A. I recollect that the Parker-Washington Company instituted some suit in the supreme court of that nature, but on what
166 street it was I do not know.
Q. On the ground that their bid was the lowest,—wasn't that the grounds of the mandamus proceeding?
A. My recollection is there were a great many grounds.
Q. Well they were claiming they were entitled to that contract?
A. I would want to see the pleadings before I stated what they contended.
Q. You remember the cases?
A. I remember the circumstance.
Q. Did the Barber Asphalt Company have anything to do with resisting that mandamus proceeding?
A. I decline to answer.
Q. Did they employ attorneys for the purpose of resisting that mandamus proceeding?
A. I decline to answer.
Q. That is all I desire to ask you Mr. Scarritt. Now if you wish to say anything on cross-examination state it.

By Mr. SCARRITT: As long as I was not advised that my deposition was to be taken my associate is not here and I decline to cross-examine myself.

By Mr. FIELD: Well make a statement if you desire to make it. Do you desire to state anything on cross-examination?
A. I decline to answer.

W. C. SCARRITT.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this 3rd day of April, 1900.

[SEAL.]

ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

Not being able to complete the taking of these depositions on this day by and with consent of counsel for the parties plaintiff and defendant to this action, I adjourn the further taking thereof until March 23d, 1900, then to be resumed at the same place and within the same hours mentioned in the annexed notice.
Given under my hand and notarial seal March 17th, 1900.

[SEAL.]

ALBERT FIDLER,
Notary Public, Jackson County, Missouri.

167 Pursuant to adjournment as above stated, on this 23d day

of March, 1900, between the same hours mentioned in the caption hereon and at the same place, all parties complainant and defendant being in attendance by counsel, I resumed the taking of these depositions as follows:

G. L. LOVE, of lawful age, duly produced, sworn and examined as aforesaid, being recalled on the part of the complainant further deposeth and saith as follows:

Direct-examination, by Mr. FIELD:

Q. Is this the petition that was filed for the paving of Main street purporting to be signed by certain persons for the paving of Main street?

A. It seems to have my stamp on it to that effect.

Q. When was it filed?

A. March 29th, 1897, I see from the date of the stamp and I take it it is correct.

Q. Is that the resolution that was passed for the paving of Main street under that petition?

A. I think so, yes sir.

Q. It was passed the same date?

A. The same date the petition was filed.

Q. That is the resolution of the board of aldermen?

A. Yes sir.

Q. I will ask you to look at that petition and state the names of any persons that appear thereon that did not reside on Main street.

A. That is that did not reside on Main street in Westport at that time?

Q. I mean fronting on that particular street.

A. Well there is Charles F. Morse, Charles J. Hubbard, Hugh C. Ward, receiver,—I do not think he lived there or lived in Westport at all.

Q. Receiver of what?

A. The Mastin estate I suppose, that is the way he signs here.

Q. Thomas H. Mastin estate?

A. John J. Mastin and Company I think it was.

Q. That included Thomas H. Mastin?

A. Yes sir. Also there are Alex M. Casey, George Southwell, Addie M. Davis,—that is all.

168 Q. There are six persons there then that did not front on Main street, on the proposed pavement on Main street? I mean that did not reside on lots fronting on Main street at that time?

A. Yes sir.

Q. Now how many persons that are on that petition did reside on the proposed pavement, that is reside on lots fronting on the proposed pavement?

A. Thomas H. Mastin. Bettie W. Ellis, Mary Seested, Mary C. Robertson, W. D. McLeod, Patrick O'Donnell, Emma B. Smith,—I

am not positive about Emma B. Smith living in that property at that time, but that is my recollection. William Warner, J. W. L. Slavans, the Metropolitan Street Railway Company,—I don't know but suppose they have a residence wherever they are.

By Mr. GRIFFITH:

Q. Their property fronts on the street doesn't it?
A. Yes sir, it fronts on the street.

By Mr. FIELD:

Q. They own all the lines in Kansas City and did at that time?
A. I think they did not own the Tenth Street or Brooklyn line or the Northeast Electric.
Q. Well they owned practically all the street railway lines in Kansas City?
A. Well they owned the larger portion.
Q. Their general offices are here in Kansas City?
A. Yes, 15th and Grand avenue.
Q. There are nine persons that signed the petition that you say resided on property fronting on the pavement?
A. That is excluding the Metropolitan Street Railway Company.
Q. Yes.
A. Yes sir, nine persons.
Q. Now did any of those persons with their premises fronting on this pavement exceed 100 feet except Mastin?
A. Yes sir.
Q. Which other?
A. Several of them. Mary Seested had 140 feet. May Robertson 206 feet. William Warner, 165 feet. J. W. L. Slavens, 440 feet.
169 Q. Now these other persons who are on that petition, these other six, Morse, Hubbard, Ward, Casey, Southwell and Davis,—did they reside in Westport at that time?
A. — think they all did. Alex Casey I think was living with his brother-in-law, Mr. Thayer, at that time and counted it his home.

Cross-examination by Mr. SCARRITT:

Q. That is all.

By Mr. FIELD: I offer to read in evidence the petition referred to in the testimony of the witness, with the file marks thereon.
Counsel for the defendant objects to said paper as incompetent, irrelevant and immaterial.

By Mr. FIELD: I now offer in evidence and read resolution num-

ber 540 referred to in the testimony of the witness, adopted by the board of aldermen March 29th, 1897.

I also offer and read in evidence the ordinance number 1803 of the board of aldermen of the city of Westport, approved May 5th, 1897.

I also offer and read in evidence the contract for the Main Street paving in question including the specifications therein for the pavement in question on Main street.

I also offer in evidence ordinance number 1818 of the mayor and board of aldermen of Westport confirming the contract just offered and read in evidence.

I also offer in evidence the report of the city engineer dated October 4th, 1897, of his apportionment of the cost of the work under resolution, ordinance and contract aforesaid.

I also offer in evidence ordinance number 1976 levying a special assessment for the issue of tax bills in payment for paving Main street from 31st street to south line of Westport avenue, approved October 5th, 1897,

Which said petition resolution, ordinances, contract and report are as follows:

170 *Petition*

To adopt a resolution to pave Main street from the central line of Springfield avenue to the south line of Westport avenue with Trinidad Lake asphalt.

Filed March 29, 1897. G. L. Love, City Clerk.

Board of aldermen, county of Jackson, Missouri.

The undersigned, real estate owners and residents of Westport, respectively own the real estate on Main street from the center line of Springfield avenue to the south line of Westport avenue, described opposite their names, by them hereto subscribed, and hereby petition the board of aldermen of said Westport to pave the roadway (exclusive of sidewalks and the spaces between the outside rails of the street railroad) of Main street in said city from center line of Springfield avenue to south line of Westport avenue, all in said city.

Said pavement to consist as follows, to-wit:

A genuine Trinidad Lake asphalt pavement. The base to be brought up to within three inches of the finished surface of the pavement, upon this base shall be laid a binder course of bituminous concrete one and one-half inches in thickness, upon this shall be laid a wearing surface one and one-half inches in thickness the matrix of which shall be composed of genuine Trinidad Lake asphalt. The pavement to be guaranteed to endure without the need of any repairs for a period of five years. The price of said pavement not to exceed $2.00 per square yd.

Attesting witness.	Owners' names.	Description of real estate in Westport, Jackson Co., Mo.
J. B. McGowan...	Charles F. Morse....	Lots 1 to 18 inclusive blk. 2 Hyde Park. 922.42 ft.
	Chas. J. Hubbard...	Lts. 1 to 11 inclusive blk. 3, Hyde Park. 567.07 ft.
John C. Tate.....	Hugh C. Ward, receiver Thos. H. Mastin.	
John C. Tate.....	Hugh C. Ward, rec. Thos. H. Mastin.	Lts. 1 to 11 inclusive blk. 10 Hyde Park. 581.80 ft. Lots 1, 2, 3, 4, Halsey & Dudley's add. 148 ft. Lts. 30, 31, 32, 33, Dudley & Hornbeck's alm't. 140.40 ft. Lts. 1 to 10 inclusive, blk. 47 Hyde Park. 503.42 ft. Lts. 13 to 24 inclusive, blk. 34 Hyde Park. 596.84 ft. Lts. 1 to 6 inclusive, blk. 44 Hyde Park. 298.42 ft. N. 83.42 ft. of lt. 1 blk. 50 Hyde Park. 83.42 ft. That pt. of lt. 4 sub John Harris estate fronting on Main St. 125 ft.
Wm. Norris.....	Bettie W. Ellis	25 feet.
Jas. B. McGowan...	Alex. M. Casey.....	Lts. 5 and 6 block 1, Hyde Park annex. 103.40 ft.
Wm. Norris.....	Geo. Southwall.....	50 feet.
J. T. Barrows.....	Mary Seested	140 Knickerbocker and Main.
J. B. McGowan	May C. Robertson..	206 feet front on Main St.
J. B. McGowan	W. D. McLeod.....	Lts. 23 and 24 blk. 19 Hyde Park. 100 ft.
Wm. Norris.....	Patrick O'Donnell..	25 ft.
J. B. McGowan	Met. St. Ry. Co., by C. F. Morse, prest.	N. 220 ft. of W. 209.47 ft. of lot 4 sub'n of Jno. Harris estate. 220 ft.
Chas. E. Finlay	Addie M. Davis	Lot 1 South View. 58 ft.
Chas. E. Finlay.....	Emma B. Smith....	Lot 2 South View. 58 ft.
J. B. McGowan	Wm. Warner	Lot B Talbott place. 165 ft.
M. Tipton	J. W. L. Slavens....	Lots 1, 2, and 3, blk. 2 McGee's Summit. 440 ft.

CITY OF WESTPORT, MO., —— —, 189–.

I hereby certify that the names signed to the foregoing petition represent a majority of the parcels of real estate owned by residents of city of Westport and fronting on Main street from 31st street to Westport avenue.

H. B. ABERCROMBIE,
City Engineer.

171 No. 540.

A resolution declaring the work of paving Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue to be necessary.

Be it resolved by the board of aldermen of the city of Westport,

That it is necessary to pave Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue in the city of Westport, to the full width thereof exclusive of sidewalks of legally established width, and the spaces between the outside rails of the street railroad on said avenue, the pavement to consist as follows, to-wit: a genuine Trinidad Lake asphalt pavement: the base to consist of broken stone laid on the present macadam of such thickness as to bring said base up to within three inches of the finished surface of the pavement, upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone, upon this base shall be laid a binder course of bituminious concrete one and one-half (1½) inches in thickness, upon this shall be laid a wearing surface one and one-half (1½) inches in thickness, the matrix of which shall be composed of genuine Trinidad Lake asphalt; the whole work to be done in conformity with the plans and specifications therefor on file in the office of the city engineer, the total cost of the pavement not to exceed the sum of two ($2) dollars per square yard: the pavement to be guaranteed to endure without the need of any repairs for a period of five years. And the board of aldermen hereby declare such work necessary to be done.

Adopted March 29, 1897.

G. L. LOVE, *City Clerk.*

Ex. 1. A. F.

No. 1803.

An ordinance to pave Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue.

Be it ordained by the board of aldermen of the city of Westport, as follows:

SECTION I. That Main street from the center line of Thirty-first street, or Springfield avenue to the south line of Westport avenue, in the city of Westport, be paved to the full width thereof, exclusive of sidewalks of legally established width and the spaces between the outside rails of the street railroad on said street.

SECTION II. The work shall consist of the materials and be laid in the manner following, viz: The pavement shall consist as follows, to-wit: a genuine Trinidad Lake asphalt pavement, the base to consist of broken stone laid on the present macadam of such thickness as to bring the said base up to within three inches of the finished surface of the pavement; upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone; upon this base shall be laid a binder course of bituminious concrete one and one-half (1½) inches in thickness; upon this shall be laid a

172 wearing surface one and one-half (1½) inches in thickness, the matrix of which shall be composed of genuine Trinidad Lake asphalt, the whole work to be done in conformity with the plans and specifications therefor on file in the office of the city engineer. The total cost of the pavement shall not exceed the sum of two dollars per square yard, the pavement to be constructed of such material and in such manner that it shall endure without the need of any repairs for a period of five years after the completion thereof.

SECTION III. When the said work shall have been completed the same shall be accepted by the city engineer and shall be paid for in special tax bills to be issued against and upon the lands that may be charged with the cost thereof according to law, all of which work the board of aldermen deem necessary to have done.

SECTION IV. In addition to a sufficient bond guaranteeing the payment of all laborers employed on the work and for all materials used therein a separate bond shall be executed to the city of Westport in the sum of twenty-five thousand dollars, conditioned that the said street pavement herein provided for shall be constructed of such materials and in such manner that the same shall endure without the need of repairs for the period of five years after the completion thereof, which bond shall have good and sufficient security to be approved by the mayor of the city, and the form thereof shall be approved by the city attorney.

SECTION V. The board of aldermen find and declare that a majority of the resident owners of property liable to taxation for the work or improvement described in sections I and II of this ordinance, have not within ten days from the date of the last publication and insertion of the resolution declaring such work or improvement necessary to be done, in the Sentinel-Examiner, a newspaper published in the city of Westport, or at any other time, filed with the said clerk their protest against such work or improvement, but that a majority of such resident owners have petitioned to have such part of said street, mentioned in section I, of this ordinance, paved and improved as hereinbefore provided.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Approved May 5th, 1897.

D. D. DRAKE,
Mayor and ex-Officio President of the Board of Aldermen.

Attest: G. L. LOVE,
City Clerk.

Indorsement on back: Filed in this office March 29th, 1897. H. B. Abercrombie, city engineer. Filed May 6th, 1897. G. L. Love, city clerk.

173 *Contract and Specifications*

For constructing asphalt pavement on Main street from the center line of 31st street to the south line of Westport avenue in the city of Westport.

Approximate estimate 23,000 sq. yds.

1897.

Contract and specifications for constructing asphalt pavement on Main street from center line of 31st street or Springfield Ave. to south line of Westport avenue, in city of Westport.

This contract made and entered into this 17th day of May, 1897, by and between The Barber Asphalt Paving Company as principal and party of the first part and Hugh J. McGowan and R. M. Snyder as securities parties of the second part; and City of Westport party of the third part.

Witnesseth: That whereas, the said party of the first part is the lowest and best bidder for making, under provisions of ordinance No. 1803, entitled "An ordinace to pave Main street from center line of 31st St. or Springfield Ave. to south line of Westport avenue in city of Westport. Approved May 5th, 1897." The following city improvements, viz: Constructing an asphalt pavement on Main street from center line of 31st street or Springfield avenue to south line of Westport avenue the full width thereof exclusive of sidewalks of legally established width and the spaces between the outside rails of the street railway on said street. The pavement to consist as follows to-wit: A genuine Trinidad Lake asphalt pavement: the base to consist of broken stone laid on the present macadam of such thickness as to bring said base up to within three inches of the finished surface of the pavement upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone. Upon this shall he laid a binder course of bituminous concrete one and one-half (1½) inches in thickness, upon this shall be laid a wearing surface one and one-half (1½) inches in thickness, the matrix of which shall be composed of genuine Trinidad Lake asphalt; the total cost of the pavement not to exceed the sum of two ($2.00) dollars and ten cents per square yard; the pavement to be guaranteed to endure without the need of repairs for a period of five years.

Specifications for constructing an asphalt pavement on Main street from the center line of 31st street or Springfield avenue to south line of Westport avenue in city of Westport.

Terms "contractor" and "city engineer."—Whenever the term "contractor" or pronoun in place thereof occurs in this agreement, it is understood to mean the party or parties of the first part in this contract. And whenever the term "city engineer" or "engineer" occurs, it is understood to mean the city engineer of city of Westport.

Manner of prosecution.—The work herein contemplated, shall be commenced at such point or points, and prosecuted in such manner, and with such force as the city engineer may direct.

Time.—Work to be commenced within twenty (20) days from the time contract binds and takes effect, and all the work completed to the satisfaction and acceptance of the city engineer, within ninety (90) days after the date of this contract. Working days to include all days, excepting only Sundays and legal holidays

Penalty.—In case the contractor shall fail to complete all the work herein contemplated, in accordance with the terms of these specifications within ninety (90) days as aforesaid, the city engineer shall deduct from the aggregate amount due according to the considerations of this contract an amount equal to ten (10) dollars per day for each and every working day after said ninety (90) days that the work is not completed as aforesaid.

174 Detention.—No allowance will be made for additional time for the completion of this contract unless the contractor shall be delayed or restrained from prosecuting the work, or any and every part thereof, or unless the time is extended by the written order of the city engineer and then only for the number of days stated in such order.

Workmen.—The contractor shall employ only competent foremen and skilled laborers, and shall promptly discharge any man or men who refuse to obey the orders of the city engineer, or his authorized agent, or any one considered by him incompetent or disorderly.

Subletting.—The contractor shall not let or transfer this contract, or any part thereof, (excepting only for the delivery of materials), without the consent in writing of the city engineer. No sub-contract shall under any circumstances, relieve the contractor of his liabilities and obligations under this contract, should sub-contractor fail to perform the work undertaken by him, in a satisfactory manner.

Privileges of contractor in street.—Contractor will be entitled to all the space between the outside rail of the railroad track and the curb, either on one side or the other of the street (but not on both sides at any one time), between such points as may be indicated by the engineer. Contractor may also occupy all the sidewalk for depositing material, only excepting six (6) feet next to the street line.

Where there are no street railways, contractor may, at the option the engineer, occupy the full width of the roadway under such co ditions as may be expressed by the engineer.

The general use of cross streets for breaking stone is prohibite except in such instances where, in the opinion of the engineer, n inconvenience to the public use of such streets will result.

Sidewalks & crossings.—Contractor shall, during the progress the work, maintain a good passable sidewalk, at least six (6) fe wide, next to the street line or elsewhere, as may be indicated .Als shall put down and maintain suitable temporary cross-walks street intersections.

Precautions.—Contractor shall put up and maintain sufficie lights at night, suitable barricades, and take any other and a proper precautions to guard against damage or injury to persons property, and interfere as little as practicable with the use of sai street.

Grade.—The term "grade" used in these specifications, is unde stood to refer to and indicate the legally established grade of th street.

Price includes.—The price per square yard of pavement, as her inafter mentioned, includes and is in full compensation for all labo material, tools or supplies of whatever nature that are employed used in the prosecution, construction, preservation, or in any ma ner whatsoever stated, implied or involved in the proper executio and protection of the work herein contemplated, according to th terms and conditions of this contract and specifications.

Inspector.—The city engineer may appoint an inspector who sha represent him on this work, and any orders he may give relative t any detail of the work shall have the same force and effect as given by the city engineer in person.

Plans and specifications.—The plans and specifications on file i the office of the city engineer relating to the work herein conte plated, and all plans which may be made by the city engineer sub sequent to the date of this contract, of an explanatory nature thereto are understood to be a part of this contract and specifications.

Measurements and amounts due.—The amount due contractor fo work done under this contract shall be determined by the city engi neer who shall measure the work and determine the actual quantit of work done and aggregate sum due, according to the price herei named as consideration for doing the work. And this aggregat sum, less any and all deductions which the city engineer is em powered or instructed to make in accordance with the terms of thi contract and specifications, shall in event of the faithful performanc

and due acceptance of the work, constitute the whole amount due under this contract, and for which special tax bills shall be issued according to law, on the completion and acceptance of the work.

Materials.—All the materials to be used for the work contemplated in this contract shall be subject to the inspection of the engineer, and only such materials used in the work as are in his opinion suitable and of acceptable quality.

Condemned material to be immediately removed from the vicinity of the work.

Failure to condemn.—Failure or neglect on the part of the city engineer, or any of his authorized agents, to condemn or reject bad or inferior work or material shall not be construed to imply
175 an acceptance of any work; if it may become evident at any time prior to the final acceptance of the work by the city engineer. The work herein specified to be done is not to be considered as finally accepted by the city engineer until the special tax bills are issued for the same.

The contractor shall protect from damage all water and gas pipes, hydrants and lamp posts, and reset to proper line and grade and repair any sidewalks or curbing that may become damaged or displaced at any time during the progress of the work.

Streets to be cleaned up and damages repaired.—Upon completion of each block in length of the work herein contemplated, the contractor shall immediately remove all materials, earth stones, and rubbish of every kind from the street, and any damage or injury done to private or public property along the street by the contractor shall be made good by him before the acceptance of this work.

Sub-grade.

The sub-grade and foundation.—The portion of the roadway to be paved shall be excavated from the present surface thereof to a depth of three (3) inches below and parallel to the surface of the completed pavement. Where the surface of the present macadam is below a plane parallel to the three (3) inches below the surface of the completed pavement, broken stone shall be laid on the present macadam of such thickness as to bring said base up to within three (3) inches of the finished surface of the pavement and upon this broken stone shall be poured one gallon of asphaltic cement to each square yard of such broken stone.

Between the curb lines of any intersecting street or alley the pavement shall be finished against a white oak plank three (3) inches thick, twelve (12) inches deep and of such lengths as the engineer

may designate. The upper edges of the plank to be neatly adzed off to conform to the finished surface of the pavement.

When the work joins any pavement already laid, the engineer may require the contractor to remove and relay a sufficient amount of the old pavement to form a satisfactory connecting of the two pavements.

Binder course.

Upon the base as above prepared there shall be spread a binder course of bituminous concrete composed of clean broken stone not exceeding one and one-half (1½) inches in their greatest dimension, and an asphaltic cement made as hereinafter specified, the parts to be thoroughly heated and then mixed by machinery in the proportion of not less than fifteen (15) gallons of asphaltic cement to one (1) cubic yard of broken stone.

The mixture shall be spread upon the base with hot irons and rakes, and while in a hot and plastic condition, shall be rammed and rolled until it forms a compact and thoroughly bonded binder course of a thickness of not less than one and one-half (1½) inches with an even and uniform surface parallel with and one and one-half (1½) inches below the completed surface of the pavement.

Wearing surface.

Upon the foundation thus prepared there shall be placed an asphalt wearing surface not less than one and one-half (1½) inches in thickness when thoroughly compressed, which shall be manufactured and laid as follows:

176 The wearing surface shall be composed of:

1st. Refined Trinidad Lake asphaltum.

2nd. Heavy petroleum oil.

3rd. Clean fine sand.

4th. Pulverized carbonate of lime.

Samples of any of the materials named, or any of the mixtures made therefrom shall be furnished the city engineer when required, and he shall also have access to all branches of the works at any time.

An asphaltic cement shall be prepared by melting and mixing acceptable qualities of refined asphaltum and heavy petroleum oil in the proportions by weight, of one hundred (100) parts pure asphalt to fifteen (15) to twenty (20) parts heavy petroleum oil.

The asphalt wearing surface shall be formed by mixing the materials as above specified in the following proportions:

Asphaltic cement from twelve (12) to fifteen (15) per cent.

Sand from eighty-three (83) to seventy (70) per cent.

Pulverized carbonate of lime from five (5) to fifteen (15) per cent.

The mixture shall be effected as follows: The asphaltic cement and sand shall be heated separately to about three hundred (300)

degrees Fahrenheit. The pulverized carbonate of lime while cold, shall be mixed with the hot sand in the required proportions and to this mixture sufficient asphaltic cement, at the required temperature, shall be added to effect a thoroughly homogeneous mixture.

The pavement mixture thus prepared shall be delivered upon the street at a temperature of not less than two hundred and fifty (250) degrees Fahrenheit. It shall then be quickly spread by means of hot iron rakes, in such manner as to insure an even and uniform surface, and to such depth that after having received its ultimate compression, it shall have a thickness of not less than one and one-half (1½) inches.

The pavement shall be ironed and rolled by hand, after which a small amount of hydraulic cement shall be swept over it, and it will then be thoroughly compressed with a steam roller, the rolling to continue as long as it makes an impression on the surface.

The gutters for a width of twelve (12) inches next to the curb shall receive a coating of hot, pure asphalt.

There shall be laid along the outside edge of all street railway tracks, a line of granite or sandstone paving blocks, not less than six (6) inches in depth, five (5) to twelve (12) inches in length, and four (4) to seven (7) inches in thickness.

General stipulations.

It is further expressly agreed between the parties hereto that this contract is made subject to the conditions and stipulations which follow:

1. The first party shall not assign or transfer this contract nor sublet any of the work embraced in it.

2. The first party shall commence work at such points as the engineer may direct, and shall conform to his directions as to the order of time in which the different parts of the work shall be done, as well as to all his other instructions as to the mode of doing the same.

3. Whenever the contractor is not present on the work, orders will be given to the superintendents or overseers in immediate charge thereof, and shall by them be received and obeyed; and if any person employed on the work shall refuse or neglect to obey the instructions of the engineer, or his duly authorized agents, in anything relating to the work, or shall appear to the engineer to be incompetent, disorderly or unfaithful, he shall, upon the requisition of the engineer, be at once discharged and not again be employed on any part of the work.

4. Any work not herein specified, which may be fairly implied as included in this contract, of which the engineer shall be judge, shall be done by the first party without extra charge.

The first party shall also do such extra work, in connection with this contract, as the engineer may especially direct, and if it shall be of a kind for which no price is stated in this contract, such price shall be fixed by the engineer, but no claims for extra work shall be allowed, unless the same was done in pursuance of special orders, as aforesaid, and the claims presented as soon as practicable after the work is done and before the final estimate.

177 5. The first party shall, upon being so directed by the engineer, remove, rebuild or make good, at his own cost, any work which the latter shall decide to be defective, and any omission to condemn any work at the time of its construction shall not be construed as an acceptance of any defective work, but the first party shall correct any imperfect work, whenever discovered before the final acceptance of the work.

6. The work embraced in this contract shall be begun within twenty (20) days after this contract binds and takes effect, and shall be prosecuted regularly and uninterruptedly thereafter with such force as to secure its full completion within ninety (90) days from the date of its confirmation; the time of beginning, rate of progress, and time of completion being essential conditions of this contract. If the contractor shall fail to complete the work within the time above specified, an amount equal to the sum of ten ($10) dollars per day for each and every day thereafter, until such completion, shall be deducted as liquidated damages for such breach of this contract from the amount of the final estimate of said work.

7. If, in the opinion of the engineer, the first party, at any time during the progress of the work, is not prosecuting the work with sufficient force to insure its completion within the time specified in this contract, he may notify the first party to employ such additional force as he deems sufficient; and on the failure of said first party to comply with such notice within three (3) days after its delivery, the engineer may put on such additional force at the cost of the said first party; or he may, at his option, declare the contract annulled. But such declaration must be confirmed and ratified by ordinance before having any force or effect.

The power is reserved to the city engineer by City of Westport to suspend or annul this contract, or to suspend the doing of any work thereunder at any time for any failure on the part of the first party to fulfill the same, or for other good cause; and any action of the city engineer in suspending or annulling this contract, or suspending the doing of the work thereunder, and his decision as to the existence of cause or reason for such annulment or suspension, shall be conclusive as to the existence of such cause or reason in any controversy or litigation between the parties hereto, or others claiming under them. If this contract be so suspended or annulled, the said first party shall not be entitled to anything on account of damages thereby, nor shall such annulment or suspension in any wise affect the right of said City of Westport to damages and penalties claimed

by it on account of the failure of said first party. But said abatement or annulment or suspension must be ratified by ordinance before being of any force or effect.

8. The first party will be required to observe all city ordinances in relation to obstructing streets, maintaining signals, keeping open passage way and protecting the same where exposed, and generally to obey all laws and ordinances controlling or limiting those engaged on the work: and the said first and second parties hereby expressly bind themselves to indemnify and save harmless City of Westport from all suits or actions, of every name and description, brought against the said city for or on account of any injuries or damages received or sustained by any party or parties by or from the acts of the said contractor, or his servants or agents, in doing the work herein contracted for, or by, or in consequence of any negligence in guarding the same, or any improper material used in its construction, or by or on account of any act or omission by the said first party, or his servants or agents.

9. The first party further agrees that he will pay for the work and labor of all laborers, teamsters, teams and wagons employed on the work, and for all materials used therein.

10. It is further agreed that the passage of the ordinance herein above referred to, and the doing of the work embraced in this contract, without any proper petition to the board of aldermen from the real estate owners to have said work done, shall not render the city liable to pay, directly or indirectly, for such work, or any part thereof, otherwise than by the issue of special tax bills, and the said first party shall assume all risks as to the validity of such special tax bills, and take the same without recourse against City of Westport in any event.

178 11. To prevent all disputes and litigations, it is further agreed by the parties hereto that the city engineer shall, in all cases, determine the amount and quantity of the several kinds of work which are to be paid for under this contract; and he shall decide all questions which may arise relative to the execution of this contract, on the part of the contractor, and his estimates and decisions shall be final and conclusive.

12. This contract is entered into subject to the approval or rejection of the board of aldermen and shall not bind until so approved, and is subject to the city charter and ordinances in general.

13. It is further expressly agreed that City of Westport shall not be liable for any delay or stoppage of said work by reason of any injunctions or legal proceedings whatever.

15. In consideration of the completion by the said first party of all work embraced in this contract in conformity with the specifications and stipulations herein contained, City of Westport party of

the third part, hereby agrees to pay to the said first party at the following rate per square yard, viz:

The sum of one ($1) dollar and ninety-seven and one-half (97½) cents.

And the said party of the first part further agrees that he will not be entitled to receive payment for any portion of the aforesaid work or materials until the same shall have been fully completed in the manner set forth in this agreement to the satisfaction and acceptance of the city engineer. And that he will then receive pay according to the above schedule of prices, in special tax bills against and upon the lands liable to be charged with the cost thereof, as provided by law, according to the charter and ordinances of said city, and that his receipt therefor shall be in full of all claims against City of Westport on account of said work.

Said parties of the second part hereby guarantee that the said party of the first part will well and truly perform the covenant hereinbefore contained; to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work, and for all materials used therein, and if the cost of such work and labor and materials is not paid in full by the said party of the first part, then the said parties of the second part hereby agree to pay for said work, labor and materials, or any part thereof, which shall not be paid by said first party within ten (10) days after the money for such work, labor and materials becomes due and payable, and this provision shall entitle any or all laborers and teamsters and owners of teams and wagons who may do work, and parties who may furnish materials on or for the improvements to be done under this contract, to sue and recover from said second parties, or either of them, the amount due or unpaid to them, or either of them, by said first party; but said second parties shall not be liable on this guarantee on account of the materials used and labor done upon said work beyond the sum of ten thousand ($10,000) dollars, the estimate cost of materials used and labor done upon said work.

The said parties of the second part hereby agree with City of Westport that the said party of the first part will well and faithfully perform each and all of the terms and stipulations in the foregoing contract, to be done, kept and performed on the part of the said first party, but said parties of the second part shall not be liable hereon beyond the sum of ten thousand ($10,000) dollars.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and seals respectively, and City of Westport executes this contract by her city engineer.

THE BARBER ASPHALT PAVING CO., [SEAL.]
By HENRY R. KASSON, *Attorney in Fact.* [SEAL.]
HUGH J. McGOWAN.
R. M. SNYDER. [SEAL.]
CITY OF WESTPORT,
By H. B. ABERCROMBIE, *City Engineer Thereof.* [SEAL.]

WESTPORT, MO., *May* 19, 1897.

The securities and bond aforesaid are hereby approved as sufficient.

D. D. DRAKE, *Mayor.*

City attorney's office.

WESTPORT, MO., *May* 26, 1897.

The foregoing contract and bond are in due form according to law and are hereby approved.

A. S. MARLEY,
City Attorney.

179 City clerk's office.

WESTPORT, MO., *May* 19, 1897.

The foregoing contract and bond have been this day confirmed by the board of aldermen of city of Westport.

Attest: G. L. LOVE, *City Clerk.*

Guarantee.

Party of the first part expressly agrees to construct the said pavement with such material and in such manner that the same shall endure without the need of any repairs for a period of — years from and after the completion and acceptance thereof.

It is expressly agreed that the city engineer shall be the sole and final arbitrator to determine at any and all times within said period of — years whether or not said pavement conforms to the aforesaid guarantee, and that when said engineer shall determine that any faults, defects or imperfections exists in said pavement during the period aforesaid, and he shall give the party of the first part or his agents notice thereof in writing, if the said party of the first part shall fail to make good such fault, defects or imperfection within ten (10) days after the receipt of such notice aforesaid, then this guarantee shall be held to have been broken and said party of the first part shall be liable to pay to City of Westport the cost of making good such fault, defect or imperfection.

When any repairs or construction of gas or water mains, or service of any sewer or connection may be necessary in said street during the life of this contract, and such construction, connection or repairs requires the tearing up of said pavement, said party of the first part shall excavate and refill all trenches that may be required, and shall replace and repair the pavement. Such trenching and refilling shall be paid for upon the actual cost to said parties of doing said work, and such repairing shall be paid for at the price herein named for the first cost of the work of paving such street, the payment for all of which shall be made by City of Westport.

Know all men by these presents: That we, The Barber Asphalt Paving Company as principal and Hugh McGowan and R. M. Snyder as securities, are firmly held and bound to City of Westport, Missouri, in the sum of twenty-five thousand ($25,000) dollars, lawful money, for the payment of which well and truly to be made we hereby bind ourselves, our heirs, executors and administrators firmly by these presents.

The conditions of the above obligations are as follows:

Whereas, the Barber Asphalt Paving Co. have guaranteed under contract with City of Westport dated May 17th, 1897, that the asphalt paving on Main street from center of 31st street to the south of Westport Ave. for the consideration and under the conditions mentioned in said contract, as provided by ordinance No. 1803, approved May 5th, 1897, shall be constructed with such materials and in such manner that the same shall endure without the need of any repairs for a period of five (5) years from and after the completion and acceptance of the same.

Now, therefore, if the said pavement shall endure without the need of any repairs for a period of — years from and after the completion and acceptance, then this obligation shall be void, otherwise to be in full force and effect.

In testimony whereof we have hereunto set our hands and seals this 17th day of May, 1897.

THE BARBER ASPHALT PAVING CO.,
By HENRY R. KASSON,
Attorney in Fact. [SEAL.]
HUGH J. McGOWAN. [SEAL.]
R. M. SNYDER. [SEAL.]

180 City counselor's office.

WESTPORT, Mo., *May 26th*, 1897.

The foregoing bond is in due form according to law and is hereby approved.

A. S. MARLEY,
City Counselor, Att'y.

WESTPORT, Mo., *May 19th*, 1897.

The foregoing bond is hereby approved this 19th day of May, 1897.

D. D. DRAKE, *Mayor.*

(Indorsement on back:) Contract city of Westport with the Barber Asphalt Paving Co., for constructing asphalt pavement on Main street, from the center line of Thirty-first (31st) street to the south line of Westport avenue. Executed May 19th, 1897. Confirmed by ordinance of board of aldermen No. 1818.

No. 1818.

An ordinance to confirm contract to pave Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue.

Be it ordained by the board of aldermen of the city of Westport, as follows:

SECTION I. That the contract dated May 17th, 1897, between the Barber Asphalt Paving Company, as principal, party of the first part and Hugh J. McGowan and R. M. Snyder as securities, parties of the second part, and the city of Westport, party of the third part, for making the following improvements, viz:

Constructing an asphalt pavement on Main street from the center line of Thirty-first (31st) street, or Springfield avenue, to the south line of Westport avenue, under the provisions of ordinance No. 1803, entitled "An ordinance to pave Main street from the center line of Thirty-first (31st) street or Springfield avenue to the south line of Westport avenue," approved May 5th, 1897, be and the same is hereby confirmed.

SECTION II. The board of aldermen find and declare that the city engineer has made an estimate of the cost of the work mentioned and described in the contract referred to in the first section of this ordinance and heretofore submitted the same to the board of aldermen and that bids for the doing of said work have been duly advertised for according to law, and that the Barber Asphalt Paving Company is the lowest and best bidder for the work required to be done by the terms of the contract and ordinance aforesaid, and the contract for such work has been duly awarded to said Barber Asphalt Paving Company.

Approved May 19th, 1897.

D. D. DRAKE,
Mayor and ex-Officio President of the Board of Aldermen.

Attest: G. L. LOVE, *City Clerk.*

181 WESTPORT, MO., *Oct.* 4, 1897.

To the honorable mayor and board of aldermen of the city of Westport.

GENTLEMEN: The work of paving Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue, under ordinance No. 1803, approved May 5th, 1897, has been completed and accepted by me as city engineer and I have apportioned the cost thereof against the land fronting on the street, according to its frontage as follows:

Description of property.	Owners.	Front feet.	Amount.
Lot 1, Zahl's add'n	John Dornseif		$266.28
" 2, "	"		266.28
" 3, "	George E. Cobb		266.28
" 4, "	Joseph Kafader		266.28
" 5, "	John S. Landis		266.28
" 6, "	Neils Hanson		266.28
" 7, "	Wm. Burns		260.33
" 8, "	Kate McDonald		260.33
" 9, "	Abigail Mason		249.92
" 1 sub. of lts. 1 to 17, S. view	State Realty Co		300.36
" 2, south view	Emma B. Smith		300.31
" 53, south view	May C. Robertson		559.34
" 54, "	"		559.34
" A, Talbott place	W. J. Caeser		1338.38
" B, "	Wm. Warner		724.04
Beg. at N. E. cor. Main street and Knickerbocker Ave. in Westport thence E. 297 f. N. 140 f. W. 297 f. S. 140 f. to beg.	Mary Seested		616.09
Lot 30 Dudley & Hornb'k's all'm't	Hugh C. Ward, rec		170.55
" 31 "	"		170.56
" 32 "	"		170.55
" 33 "	"		172.50
" 1 Halsey & Dudley's add'n	"		180.30
" 2 "	"		180.30
" 3 "	"		180.30
" 4 "	"		181.52
Halsey & Dudley's add'n.			
N. 31, 8 f. of E. 44 f. of W. 54 f. lot 5.	H. M. Beardsley	31.8	153.10
S. 5.44 f. of E. 44 f. of W. 54 f. lot 5.	"	5.44	26.20
N. 13.8 f. of E. 42 f. of W. 52 f. lot 6.	"	13.8	66.44
S. 19.29 f. of N. 33.09 f. of E. 44 f. of W. 54 f. lt. 6.	"	19.29	92.87
S. 3.91 f. of E. 73 f. of W. 83 f. lot 6.	Anna V. Eshleman	3.91	18.83
N. 15.38 f. of E. 73 f. of W. 83 f. lot 7.	"	15.38	74.05
S. 19.29 f. of N. 34.67 f. of E. 73 f. of W. 83 f. of lot 7.	Richard L. Austin	19.29	92.87
S. 2.33 f. of E. 73 f. of W. 83 f. of lot 7.	H. M. Beardsley	2.33	11.22
N. 17.13 f. of E. 73 f. of W. 83 f. of lot 8.	"	17.13	82.47
S. 19.87 f. of E. 73 of W. 83 f.	Alfred Crebbin	19.87	95.66
Lot 1 Chadwick's 2nd add'n	C. W. Whitehead	37	178.14
" 2 "	"	37	178.14
" 3 "	"	37	178 14
" 4 "	"	37	178.14
" 5 "	A. L. Charles	37	189.26
" 6 "	"	37	189.26
" 7 "	"	37	189.26
" 8 "	"	37	189.26
" 1 block 11 Hyde Park	W. A. Bunker	153.5	785.19
" A (W. ½) 18 "	Thos. Barrett	50.0	70.42
" 1 block 18 "	Dr. A. Hartsuff	166.8	783.09

Description of property.	Owners.	Front feet.	Amount.
Lot 14 block 18 "	West Inv. Co.....	50	234.74
" 15 " 18 "	"	50	234.74
" 16 " 18 "	"	50	234.74
" 17 " 18 "	"	50	234.74
182			
" 18 block 18 "	West. Invest. Co.....	50	234.74
" 19 " 18 "	"	50	234.74
" 20 " 18 "	"	50	234.74
" 21 " 18 "	"	50	234.74
" 13 " 19 "	"	39.3	180.21
" 14 " 19 "	"	50	229.30
" 15 " 19 "	"	50	229.30
" 16 " 19 "	"	50	229.30
" 17 " 19 "	"	50	229.30
" 18 " 19 "	"	55	229.30
" 19 " 19 "	"	50	229.30
" 20 " 18 "	"	50	229.30
" 21 " 19 "	"	50	229.30
" 22 " 19 "	"	50	229.30
" 23 " 19 "	W. D. McLeod.....	50	229.30
" 24 " 19 "	"	50	229.30
" 24 " 34 "	Hugh C. Ward, rec...	48.4	217.40
" 23 " 34 "	" ...	50	224.58
" 22 " 34 "	" ...	50	224.58
" 21 " 34 "	" ...	50	224.58
" 20 " 34 "	" ...	50	224.58
" 19 " 34 "	" ...	50	224.58
" 18 " 34 "	" ...	50	224.58
" 17 " 34 "	" ...	50	224.58
" 16 " 34 "	" ...	50	224.58
" 15 " 34 "	" ...	50	224.58
" 14 " 34 "	" ...	50	224.58
" 13 " 34 "	" ...	48.4	217.40
" 7 " 35 "	Edward A. Halsey...	50	222.38
" 8 " 35 "	" ...	50	222.38
" 9 " 35 "	" ...	50	222.38
" 10 " 35 "	" ...	50	222.38
" 11 " 35 "	" ...	50	222.38
" 12 " 35 "	" ...	48.4	215.26
" 7 " 52 "	K. V. K. Hale.....	48.4	215.26
" 8 " 52 "	L. D. H. Russell.....	50	222.38
" 9 " 52 "	"	50	222.38
" 10 " 52 "	"	50	222.38
" 11 " 52 "	"	50	222.38
" 12 " 52 "	"	50	222.38
Beg. at a point 20 f. S. of the E. and W. center line of sec. 20, T. 49, R. 33, and 40 f. E. of the N. and S. center line of the E. ½ s'd sec. 20 thence S. 220 f., E. 209 f., N. 220 f., W. 209 f. to beg.	Grand Av. Cable Ry.	220	899.10
Beg. on the E. line of Main St. in Westport, 365 f. S. of N. line of S.-W. ¼ sec. 20, T. 49, R. 33, thence E. 121.5 f., S. 25 f., W. 121.5 f. N. 25 f. to beg.	P. O'Donnell..... J. G. Groves, Tr .. F. S. Groves	25	102.17

Description of property.	Owners.	Front feet.	Amount.
Beg. on the E. line of Main St. in Westport, 415 f. S. of N. line of S.-W. ¼ sec. 20, T. 49, R. 33, E. 121.5 f., N. 25 f., W. 121.5 f., S. 25 f. to beg.	George Southwell	25	$102.17
Beg. on E. line of Main St. in Westport 415 f. S. of N. line of S.-W. ¼ sec. 20, T. 49, R. 33, thence E. 121.5 f., S. 25 f., W. 121.5 f., N. 25 f. to beg.	"	25	102.17
Beg. on the E. line of Main St. in Westport, 240 f. S. of N. line of S.-W. ¼ sec. 20, T. 49, R. 33, thence E. 121.5 f., S. 75 f., W. 121.5 f., N. 75 f. to beg.	Hugh C. Ward, rec ..	75	306.51
Beg. on E. line of Main St. in Westport, 315 f. S. of N. line of S.-W. ¼ sec. 20, T. 49, R. 33, thence E. 121.5 f., S. 50 f., W. 121.5 f., N. 50 f. to beg.	" ...	50	204.34
Amended plat of McGee's summit.			
Lot 1 block 1 (N. 113 f. of W. 230.5 f.)	L. F. Dearborn	113	476.15
" 1 " 1 (S. 29 f.).... ...	Mary F. Miller... ..	29	122.19
" 2 " 1 (S. ½ of W. 230.5)	Theo. F. Meyer	71	299.17
" 2 " 1 (W. 105 f. of S. 125 f. N. ½.)	M. F. Miller...	71	299.17
183			
" 3 " 1.....	Theo. F. Myers.....	142	598.34
" 1 " 2.....	J. W. L. Slavens.....	144	713.66
" 2 " 2.....	"	144	713.66
" 3 " 2	"	177.2	878.20
" 1 " 2 Hyde Park.....	Hugh C. Ward rec ..	70.26	309.88
" 2 " 2 "	C. F. Morse and ..	50	220.52
" 3 " 2 "	Chas. J. Hubbard...	50	220.52
" 4 " 2 "	" ...	50	220.52
" 5 " 2 "	" ...	50	220.52
" 6 " 2 "	" ...	50	220.52
" 7 " 2 "	" ...	50	220.52
" 8 " 2 "	" ...	50	220.52
" 9 " 2 "	" ...	50	220.52
" 10 " 2 "	" ...	50	220.52
" 11 " 2 "	" ...	50	220.52
" 12 " 2 "	" ...	50	220.52
" 13 block 2 Hyde Park.....	Hugh C. Ward rec..	50	220.52
" 14 " 2 "	C. F. Morse Jr.....	50	220.52
" 15 " 2 "	Chas. J. Hubbard...	50	220.52
" 16 " 2 "	" ...	50	220.52
" 17 " 2 "	" ...	50	220.52
" 18 " 2 "	" ...	50.42	231.20
" 1 " 3 "	" ...	57.37	264.45
" 2 " 3 "	" ...	50	230.48
" 3 " 3 "	" ...	50	230.48
" 4 " 3 "	" ...	50	230.48
" 5 " 3 "	" ...	50	230.48
" 6 " 3 "	" ...	50	230.48
" 7 " 3 "	" ..	50	230.48

Description of property.	Owners.	Front feet.	Amount.
Lot 8 block 3 "	" ...	50	$230.48
" 9 " 3 "	" ...	50	230.48
" 10 " 3 "	" ...	50	230.48
" 11 " 3 "	" ...	58.79	270.99
" 1 " 10 "	" ...	65.9	307.70
" 2 " 10 "	" ...	50	233.45
" 3 " 10 "	" ...	50	233.45
" 4 " 10 "	" ...	50	233.45
" 5 " 10 "	" ...	50	233.45
" 6 " 10 "	" ...	50	233.45
" 7 " 10 "	" ...	50	233.45
" 8 " 10 "	" ...	50	233.45
" 9 " 10 "	" ...	50	233.45
" 10 " 10 "	" ...	50	233.45
" 11 " 10 "	" ...	65.9	307.70
" 1 " 30 "	H. C. Gilbert	50	226.17
" 2 " 30 "	E. A. Smith	50	226.17
" 3 " 30 "	W. J. Caesar.....	50	226.17
" 4 " 30 "	Alice L. Stockham ...	50	226.17
" 5 " 30 "	S. J. C. Clark.....	50	226.17
" 6 " 30 "	....do	50	185.01
" 1 " 1 Hyde Park annex	Helen J. Firth.....	50	226.17
" 2 " 1 "	J'ph'e K. Gregory *et al.*	50	226.17
" 3 " 1 "	"	50	226.17
" 4 " 1 "	"	50	226.17
" 5 " 1 "	Alex M. Casey.....	53.4	241.55
" 6 " 1 "	"	53.42	234.64
" 1 " 47 Hyde Park.....	Matilda Schroeder ...	50	219.61
" 2 " 47 "	" ...	50	219.61
" 3 " 47 "	Hugh C. Ward.....	50	219.61
" 4 " 47 "	"	50	219.61
" 5 " 47 "	"	50	219.61
" 6 " 47 "	"	50	219.61
" 7 " 47 "	"	50	219.61
" 8 " 47 "	"	50	219.61
" 9 " 47 "	"	50	219.61
" 10 " 47 "	James Ellison.....	50	219.61
" 11 " 47 "	"	48.42	212.57
" 12 " 47 "	Hugh C. Ward rec ...	83.42	370.00
" 1 N. 83.42 50 "			
184			
" 1 S. 15 50 "	R. H. Field.....	15	66.54
" 1 " 39 "	"	60	266.13
" 2 " 39 "	"	50	221.77
" 3 " 39 "	W. M. Smith	50	221.77
" 4 " 39 "	H. T. Hudson.....	50	221.77
" 1 " 44 "	Hugh C. Ward rec ...	50	221.77
" 2 " 44 "	" ...	50	221.77
" 3 " 44 "	" ...	50	221.77
" 4 " 44 "	" ...	50	221.77
" 5 " 44 "	" ...	48.42	214.77
" 6 " 44 "	Annie Camp Field...	50	232.23
" 1 " 45 "	"	50	232.23
" 2 " 45 "	"	50	232.23
" 3 " 45 "	"	50	232.23
" 4 " 45 "			

Description of property.	Owners.	Front feet.	Amount.
Lot 5 S. 15 45 "	"	55.02	255.53
" 1 " 1 Cor. plat of ..... Amended plat of F. M. Hayden.	J. E. Cunningham ...	81.23	377.29
" 2 " 1 Mendell's Murray Hill.	F. M. Hayden.....	67.17	311.99
		10218.87 ft.	$47019.67

Respectfully submitted,
(Signed) H. B. ABERCROMBIE,
City Engineer.

No. 1976.

An ordinance levying a special assessment and for the issue of tax bills in payment for paving Main street from Thirty-first street to the south line of Westport avenue.

Be it ordained by the board of aldermen of the city of Westport, as follows:

SEC. 1. That the report of the city engineer to the effect that the work of paving Main street from the center line of Thirty-first street to the south line of Westport avenue, has been completed and by him accepted and the cost thereof apportioned as stated in said report, is hereby received, ordered filed and approved, and said report shall be by the city clerk attached to this ordinance and is hereby expressly referred to and made a part hereof.

SEC. 2. A special assessment is hereby levied and made against the respective lots and tracts of land described in said report for the respective amounts named therein, and the city engineer is hereby ordered to make out and certify special tax bills for said special assessment against said lots and for the amount stated in said report; said tax bills to be issued in favor of the Barber Asphalt Paving Company, the contractor with the city for doing the said work. And said tax bills shall be issued and executed according to law, and shall bear interest at the rate of eight per cent. per annum until paid.

In cases where the owners have notified the city clerk, as required by law, that they desire said bills to be issued in installments, the same shall be so issued by the city engineer according to law, and said installment bills shall bear interest from the date of issue at the rate of six per cent. per annum.

SEC. 3. Said tax bills shall be registered by the city clerk in his office and shall by him be delivered to the parties in whose favor issued,

and he shall take the receipt of such party or parties in full for all claims against the city on account of said work.

SEC. 4. Any owner or person interested in any of the lots or
185 parcels of land against which said tax bills are issued may pay the amount of any such tax bill together with accrued interest thereon to the date of payment to the city clerk, and the city clerk shall cancel the record of the same in his office, and the lot or tract shall then stand released and free of the lien of such tax bill, and the clerk shall pay the amount so collected on such tax bill to the owner or holder thereof upon presentation of such bill, and shall then cancel said bill and file and keep the same as a part of the records of the office.

Approved Oct. 5th. 1897.

D. D. DRAKE,
Mayor and ex-Officio President of the Board of Aldermen.

Attest: G. L. LOVE, *City Clerk.*

186 By Mr. FIELD: That is all on Main street.

Q. I now show you a petition purporting to be filed June 14th, 1897, by you as city clerk of Westport,—I will ask you if that is the petition upon which the board of aldermen acted in adopting the resolution for the pavement of Baltimore avenue in question?

A. I think it is.

Q. Was that petition filed with you as city clerk of Westport?

A. Yes, sir, it has my stamp on it, June 14th, 1897.

Q. Will you please read the names of the persons on that petition asking the board of aldermen to adopt the resolution declaring the work necessary, who did not reside on lots fronting on the proposed pavement?

A. Charles J. Hubbard, Charles F. Morse, Hugh C. Ward, receiver, C. W. Whitehead, W. B. Jewett and J. W. Martin. Now Thomas H. Mastin,—I don't know whether you would count him as fronting on Baltimore avenue or not. His residence runs from Main to Baltimore avenue. John J. Mastin, who owned lots one and two, block 9, Hyde Park, is the son of Thomas H. Mastin and I don't know whether he called his father's house his home or not. He was there a good part of the time.

Q. And these names that you have called did not reside on lots fronting on Baltimore avenue at that time?

A. I have called the six that did not live on the street.

Q. How many persons are there on that petition who at that time resided on property fronting on Baltimore avenue between those points?

A. R. B. Green, F. C. Wornall, Anna L. Graves, Addie H. Beedle, Mayme Schroder Dunshee, Hale H. Cook, R. H. Keith and M. Schoonamaker.

Q. Now those ten names counting the Mastins as fronting on Bal-

timore avenue constitute the number on the petition that then r
sided on lots fronting on that part of Baltimore avenue?

A. Yes sir.

187 Q. How nearly did those ten names come to representin
all the people that did reside on Baltimore avenue at tha
time?

A. I think there were only two that were out. I am not sur
about Mrs. Wornall,—whether she lived on that property at tha
time or out on the farm. If she was there she and one other living
on the street were the only ones that did not petition for the work.

Q. Then as I understand there were only 12 houses fronting on
Baltimore avenue for the length of a mile or more?

A. No, there is one other that I know, a property owner by the
name of Clark who lived in Chicago,—I do not think of any other.

Q. Seventy-five per cent. then of the lots fronting on Baltimore
avenue on the proposed pavement were vacant and unimproved at
that time?

A. I do not know what per cent.,—it was a large proportion.

Cross-examination by Mr. SCARRITT:

Q. A large number of houses have been built on lots fronting on
that street since the petition has been filed?

A. Since I was here the other day I paid a little attention to that
and I find there are 25 new houses fronting on Baltimore avenue
since the pavement.

Q. Since the petition was filed?

A. Yes sir.

Q. And they are all nice houses?

A. They are nice residences, not all very fine, but I believe the
restrictions require $4,500.

By Mr. FIELD: Well they have been less.

By Mr. SCARRITT:

Q. That section has developed very rapidly?

Counsel for complainant objects to the question as immaterial.

A. Yes sir.

Q. And new residences are being built on streets paved with
asphalt, largely?

Counsel for complainant objects to question as immaterial.

188 A. Well very largely.

Q. The property owners have to have paved streets in order
to get people to live out there?

A. Well I do not know as to that. People like to live out there.

By Mr. FIELD:

Redirect examination:

Q. I will ask you who has built the majority of these houses that you have named since this pavement?

A. Well I think that the C. E. Finlay Company and its connections have built the larger portion of them.

Q. They have been built for the purpose of selling when built, have they?

A. I suppose so.

Q. Mr. Finlay himself does not reside out there?

A. He lives in Westport but not on that street.

Q. These houses were built to sell as I understand you?

A. I presume they were.

Q. Now you spoke about the cost of these houses,—do you know about that?

A. I do not know anything only in relation to the selling price of some of them.

Q. You know that from seeing deeds recorded?

A. Yes sir.

Q. You do not know whether the deeds recorded recited the true amount of the consideration or not?

A. I do not know, only the price he held on them.

Q. Did you value these houses when you were assessing, at $4500?

A. I think that is what we put them at, $4500 and $5000.

Q. And some of them a great deal less than that? Don't you know the houses on the east side of Baltimore avenue between 39th and Westport avenue that Mr. Finley built he had advertised for sale a long time here for $2700?

A. No, I was thinking of the houses north of 39th street between 37th and 38th.

Q. How many of those houses are there? About 7 or 8 of them, aren't there?

189 A. I think there are more than that, I would think nine or 10.

Q. Do you call a street a fashionable street, Doctor, where a broker will buy lots and build houses for sale?

A. Well I do not know just what you mean by a fashionable street.

Q. Do you call that sort of a neighborhood created in that way a desirable neighborhood, where people do not select their own lots and select their own architect and select their own house,—do you think that is a fine neighborhood to get in a neighborhood built in that way?

A. I think there are some very excellent people that have bought property built in that way.

Q. Do you know any of those people that have bought those houses?

A. Yes, I know Doctor Barber has bought one.

Q. Is he a horse doctor or general doctor?

A. No, he is the head of this school of osteopathy here.

Q. Running a fraudulent school teaching osteopathy?

A. I do not know about that.

Q. Don't you know of his being indicted for running a fraudulent school?

A. I do not know anything about that.

Q. He had an injunction suit brought against him?

A. I do not know about that.

Q. Is he the most excellent acquisition to that neighborhood?

A. I do not know whether he is the most excellent.

Q. Well who are these most excellent people?

A. I did not say these people were the most excellent. I said some most excellent people bought houses on that plan.

Q. On other streets?

A. In my business I left Westport and came to Kansas City and I have been away from there in my business relations and I do not keep my business acquaintances as before but I notice the people who get off and on the cars that come from that property and they look to be very respectable people.

Q. I am not disputing their respectability, and I don't know
190 anything about Dr. Barber,——

A. I think I heard of some trouble he had.

Q. These houses are sold on the installment plan—people pay so much down and so much a month and then fail in payment of the installments and Finley gets the property back?

A. Some of the property has been bought outright.

Q. Now do you know a house that has been built out there on Baltimore avenue since Mr. Keith's house that has added anything to the value of the street?

A. Well yes, I think that all of those houses have added something to the value of the street.

Q. You do not think it is a detriment then to have people who bought houses on the installment plan and mortgage them back instead of having people who build houses according to their own selection?

A. Well that is a matter of opinion. I think a man who has a good position, reasonably per-anent, with a good salary, if he buys him a home I think he will pay for it out of his earnings or salary and it is a very good thing.

Q. I do not dispute that Doctor, and I do not say but some of them are very good people, but I say does that class of population add to the value of the property?

A. I do not like to testify on that point. The property has advanced in price very materially since it was built up.

By Mr. FIELD: (1.) I offer in evidence the petition to pave Baltimore avenue, referred to by the witness, and the file marks thereon.

(2.) I also offer in evidence the resolution of the board of aldermen adopted in pursuance of that petition.

(3.) I also offer in evidence the ordinance ordering the work to be done.

(4.) I also offer in evidence the contract, including the specifications under which the paving of Baltimore avenue in question was done, and

191 (5.) I also offer in evidence the ordinance of the mayor and board of aldermen of Westport confirming the contract just offered and read in evidence.

(6.) I also offer in evidence the report of the engineer of his apportionment of the cost of the work, and

(7.) I also offer in evidence the ordinance of the mayor and board of aldermen of Westport levying the assessment for the paving of Baltimore avenue in question,

Which said petition resolution, ordinances, contract and report are read as follows:

Board of aldermen of the city of Westport, Jackson county, Missouri:

The undersigned, real estate owners and residents of the city of Westport, respectively own the real estate on Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue, described opposite their names, by them hereto subscribed, and hereby petition the board of aldermen of the city of Westport to adopt a resolution declaring it to be necessary to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue, all in said city of Westport.

Said work or improvement to consist as follows, to-wit:

The street to be paved the full width thereof, exclusive of sidewalks of legally established widths, and a space 12 inches in width on both sides of said avenue with a genuine Trinidad Lake asphalt pavement to be laid as follows: The foundation to consist of a layer of hydraulic cement concrete four (4) inches in thickness, upon which shall be spread a binder course of bituminous concrete 1¼ inches in thickness, upon which shall be placed a wearing surface 1¼ inches in thickness, the matrix of which shall be made of refined Trinidad Lake asphaltum. The total cost of the pavement not to exceed the sum of $2.10 per square yard. The pavement to be constructed of such materials and in such a manner that it shall endure without the need of any repairs for a period of five (5) years after the completion thereof.

Attesting witnesses.	Owners' names.	Description of real estate in the city of Westport, Jackson Co., Mo.
John C. Tate	Chas. J. Hubbard.	Lots 6 to 16 inclusive blk. 1, Hyde Park.
John C. Tate	Charles F. Morse	Lts. 19 to 35 inclusive blk. 2, Hyde Park.
John C. Tate	Hugh C. Ward, receiver.	Lots 1 to 11 inclusive blk. 4, Hyde Park.
John C. Tate	Thos. H. Mastin	Lots 12 to 22 inclusive blk. 3, Hyde Park.
John C. Tate	John J. Mastin	Lts. 1 and 2 blk. 9 Hyde Park.
		Lots 3 to 11, inclusive blk. 9 Hyde Park.
		Lts. 12 to 22 inclusive, blk. 10 Hyde Park.
John C. Tate	Hugh C. Ward, receiver.	Lts. 1 to 10 inclusive, blk. 48 Hyde Park.
John C. Tate	Thomas H. Mastin.	N. ½ lt. 14 and lts. 15 to 24, inclusive, blk. 47, Hyde Pk.
		N. 83.42 lot 2 blk. 50, Hyde Park.
192		Lots 7 to 12 inclusive blk. 44, Hyde Park.
John C. Tate	R. B. Greene	Lot 13 and south ½ lt. 14 blk. 47 Hyde Park.
J. B. McGowan	F. C. Wornall	Lts. 5 & 6 blk. 44 Hyde Park. and 15 5-30 lt. 4 blk. 46 Hyde Park. 185 feet.
Frank S. Graves	Hannah L. Graves.	75 feet.
A. D. Beedle	Addie H. Beedle	91 feet.
W. D. Dunshee	Mayme Schroeder Dunshee.	100 feet.
J. B. McGowan	Hale H. Cook	50 ft. lt. 1 blk. 2 Hyde Park annex.
J. B. McGowan	R. H. Keith	Lts. 1 to 5 blk. 1 Hyde Park.
J. B. McGowan	M. Schoonmaker	Lt. 7 blk. 30 Hyde Park.
J. B. McGowan	C. W. Whitehead	Lt. 8 blk. 30 Hyde Park.
E. S. Jewett	Amelia V. Jewett	Mendel's Murry Hill, lot 8 blk. one.
Wm. Norris	J. W. Martin	Lts. 1 and 2 and N. ¼ of lot 3.

We hereby certify the names signed to the foregoing petition represent a majority of the front feet of real estate owned by residents of city of Westport and fronting on —— to ——.

—— ——,
City Engineer.

—— ——.
—— ——.
—— ——.
—— ——.

Westport, Mo.

Petition C. J. Hubbard *et al.* to adopt a resolution to pave from the south line of Hunter avenue to the north line of Westport avenue with Trinidad Lake asphalt on concrete.

Presented by

—— ——.

Filed June 14, 1897.

G. L. LOVE, *City Clerk.*

No. 570.

A resolution declaring the work of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue to be necessary.

Be it resolved by the board of aldermen of the city of Westport, That it is necessary to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue in the city of Westport, to the full width thereof exclusive of sidewalks of legally width, and a gutter twelve (12) inches wide on each side of said street, the pavement to consist as follows, to wit:

A genuine Trinidad Lake asphalt pavement: The base to consist of a layer of hydraulic cement concrete, four (4) inches in thickness, upon which shall be spread a binder course of bituminous concrete one and one-fourth (1¼) inches in thickness, upon which shall be placed a wearing surface one and one-fourth (1¼) inches in thickness, the matrix of which shall be made of genuine Trinidad Lake asphalt; the total cost of the pavement not to exceed the sum of two and (10–100) ($2.10) dollars per square yard; the pavement to be constructed of such materials and in such a manner, that it shall endure without the need of repairs for a period of five years after the completion thereof, the whole work to be done in conformity with the plans and specifications therefor, on file in the office of the city engineer and the board of aldermen hereby declare such work necessary to be done.

Adopted June 17th, 1897.

G. L. LOVE, *City Clerk.*

193 No. 1866.

An ordinance to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue.

Be it ordained by the board of aldermen of the city of Westport, as follows:

SECTION I. That Baltimore avenue from the south line of Hunter avenue, to the north line of Westport avenue, in the city of Westport, be paved to the full width thereof, exclusive of sidewalks of legally established width and a gutter twelve (12) inches wide on each side of said street.

SECTION II. The work shall consist of the materials and be laid in the manner following, viz: All unnecessary materials shall be removed from the street, soft or spongy places not affording a firm foundation shall be taken out and refilled with good earth well rammed, and the entire roadbed thoroughly rolled with a steam roller so as to bring the road bed to a plane parallel with and six and

one-half inches below the established grade and finished surface of the pavement; upon this shall be laid a layer of hydraulic cement concrete four inches in thickness, upon which shall be spread a binder course of bituminous concrete one and one-fourth (1¼) inches in thickness; upon which shall be placed a wearing surface one and one-fourth (1¼) inches in thickness, the matrix of which shall be composed of genuine Trinidad Lake asphalt; the total cost of the pavement not to exceed the sum of two and 10–100 dollars per square yard; the pavement to be constructed of such materials and in such manner that it shall endure without the need of repairs for a period of five years after the completion thereof; the whole work to be done in strict conformity with the plans and specifications therefor on file in the office of the city engineer.

SECTION III. The work shall be completed within four months from the time a contract therefor binds and takes effect, and when the said work shall have been completed the same shall be accepted by the city engineer and shall be paid for in special tax bills to be issued against and upon the land that may be charged with the cost thereof according to law, all of which work the board of aldermen deem necessary to have done.

SECTION IV. In addition to a sufficient bond guaranteeing the payment of all laborers employed on the work and for all materials used therein a separate bond shall be executed to the City of Westport in the sum of five thousand ($5000) dollars, conditioned that the said street pavement herein provided for shall be constructed of such materials and in such manner that the same shall endure without the need of repairs for the period of five years after the completion thereof, which bond shall have good and sufficient security to be approved by the mayor of the city, and the form thereof shall be approved by the city attorney.

194 SECTION V. The board of aldermen find and declare that a majority of the resident owners of property liable to taxation for the work or improvement described in sections one and two of this ordinance, have not within ten days from the date of the last publication and insertion of the resolution declaring such work or improvement necessary to be done, in the Sentinel-Examiner, a newspaper printed and published in the city of Westport, or at any other time, filed with the city clerk their protest against said work or improvement, but that a majority of such resident owners have petitioned to have such part of said street, mentioned in section I, of this ordinance, paved and improved as hereinbefore provided.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Approved July 16th, 1897.

D. D. DRAKE,
Mayor and ex-Officio President of the Board of Aldermen.
J. M. McMILLAN,
Acting President of the Board of Aldermen and Acting Mayor.

Attest: G. L. LOVE, *City Clerk.*

Indorsement on back: Filed in this office June 10th, 1897. H. B. Abercrombie, city engineer. Filed July 16th, 1897. G. L. Love, city clerk.

Contract and Specifications

For constructing asphalt pavement on Baltimore avenue from Hunter avenue to Westport avenue.

Approximate estimate, 12,500 sq. yds.

City of Westport, 1897.

Contract and specifications for constructing asphalt pavement on Baltimore avenue the full width thereof, exclusive of sidewalks of legally established width, and a gutter twelve inches wide on each side of said street from the south line of Hunter avenue to the north line of Westport avenue.

This contract made and entered into this 26th day of July, 1897, by and between the Barber Asphalt Paving Company as principal and party of the first part and Hugh J. McGowan and Joseph Lorie, as securities parties of the second part; and the City of Westport, party of the third part.

Witnesseth: That whereas, the said party of the first part is the lowest and best bidder for making, under provisions of ordinance No. 1866, entitled "An ordinance to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue. Approved July 16th, 1897. The following city improvements, viz: Constructing and guaranteeing for a period of five years, an asphalt pavement on Baltimore avenue, the full width thereof ex-
195 clusive of sidewalks of legally established width and a gutter 12 inches wide on each side of said street from the south line of Hunter avenue to the north line of Westport avenue.

The pavement to consist as follows, to-wit:

A genuine Trinidad Lake asphalt pavement: The base to consist of a layer of hydraulic cement concrete four (4) inches in thickness, upon which shall be spread a binder course of bituminous concrete one and one-fourth (1¼) inches in thinkness, upon which shall be placed a wearing surface one and one-fourth (1¼) inches in thickness, the matrix of which shall be made of genuine Trinidad Lake asphalt, the total cost of the pavement not to exceed the sum of two and 10-100 ($2.10) dollars per square yard; the pavement to be constructed of such materials and in such a manner that it shall endure without the need of any repairs for a period of five years after the

completion thereof; the whole work to be done in conformity with the plans and specifications therefor on file in the office of the city engineer.

Now, therefore, the said party of the first part does hereby agree and bind himself, his heirs executors and assigns, to furnish all the material and do all the work necessary to perform the work above mentioned, according to the terms of said ordinance No. 1866, and in conformity to the specifications hereinafter contained and made part of this contract, and to the satisfaction and acceptance of the city engineer of the city of Westport, and to guarantee that the same shall be constructed of such materials and in such manner that it shall endure without the need of any repairs for a period of 5 years, from and after completion and final acceptance of the same, without further compensation than that provided for in this contract for the first cost of said work, and the acceptance of the work done hereunder and the issue of special tax bills in payment therefor shall not be held to prevent the maintenance of an action on the contractor's bond for failure to construct said work with such materials and in such manner that the same shall endure without the need of any repairs for the required period.

Specifications for constructing and guaranteeing for a period of 5 years an asphalt pavement on Baltimore avenue the full width thereof, exclusive of sidewalks of legally established width, a gutter twelve (12) inches wide on each side of said street from the south line of Hunter avenue to the north line of Westport avenue.

Whenever the term "contractor" or pronoun in place thereof occurs in this agreement, it is understood to mean the party or parties of the first part in this contract. And whenever the term "city engineer" or "engineer" occurs, it is understood to mean the city engineer of the city of Westport.

The work herein contemplated, shall be commenced at such point or points, and prosecuted in such manner, and with such force as the city engineer may direct.

Work to be commenced within 60 days from the time contract binds and takes effect, and all the work completed to the satisfaction and acceptance of the city engineer, within four (4) months after the date of this contract. Working days to include all days, excepting only Sundays and legal holidays.

196 In case the contractor shall fail to complete all the work herein contemplated, in accordance with the terms of these specifications within four (4) months as aforesaid, the city engineer shall deduct from the aggregate amount due according to the considerations of this contract an amount equal to ten (10) dollars per day for each and every working day after said four (4) months that the work is not completed as aforesaid.

No allowance will be made for additional time for the completion of this contract unless the contractor shall be delayed or restrained from prosecuting the work, or any and every part thereof, or unless

the time is extended by the written order of the city engineer and then only for the number of days stated in such order.

The contractor shall employ only competent foremen and skilled laborers, and shall promptly discharge any man or men who refuse to obey the orders of the city engineer, or his authorized agent, or any one considered by him incompetent or disorderly.

The contractor shall not let or transfer this contract, or any part thereof, (excepting only for the delivery of materials), without the consent in writing of the city engineer. No sub-contract shall under any circumstances, relieve the contractor of his liabilities and obligations under this contract, should sub-contractor fail to perform the work undertaken by him, in a satisfactory manner.

Contractor will be entitled to all the space between the outside rail of the railroad track and the curb, either on one side or the other of the street (but not on both sides at any one time), between such points as may be indicated by the engineer. Contractor may also occupy all the sidewalk for depositing material, only excepting six (6) feet next to the street line. Where there are no street railways, contractor may, at the option of the engineer, occupy the full width of the roadway under such conditions as may be expressed by the engineer.

The general use of cross streets for breaking stone is prohibited, except in such instances where, in the opinion of the engineer, no inconvenience to the public use of such streets will result.

Contractor shall, during the progress of the work, maintain a good passable sidewalk, at least six (6) feet wide, next to the street line or elsewhere, as may be indicated Also, shall put down and maintain suitable temporary cross-walks at street intersections.

Contractor shall put up and maintain sufficient lights at night, suitable barricades, and take any other and all proper precautions to guard against damage or injury to persons or property, and interfere as little as practicable with the use of said street.

The term "grade" used in these specifications, is understood to refer to and indicate the legally established grade of the street.

The price per square yard of pavement, as hereinafter mentioned, includes and is in full compensation for all labor, material, tools or supplies of whatever nature that are employed or used in the prosecution, construction, preservation, or in any manner whatsoever stated, implied or involved in the proper execution and protection of the work herein contemplated, according to the terms and conditions of this contract and specifications.

The city engineer may appoint an inspector who shall represent him on this work, and any orders he may give relative to any detail of the work shall have the same force and effect as if given by the city engineer in person.

The plans and specifications on file in the office of the city engineer relating to the work herein contemplated, and all plans which may be made by the city engineer subsequent to the date of this contract, of an explanatory nature thereto, are understood to be a part of this contract and specifications.

The amount due contractor for work done under this contract shall be determined by the city engineer who shall measure the work and determine the actual quantity of work done and aggregate sum due, according to the price herein named as consideration for doing the work. And this aggregate sum, less any and all deductions which the city engineer is empowered or instructed to make in accordance with the terms of this contract and specifications, shall in event of the faithful performance and due acceptance of the work, constitute the whole amount due under this contract, and for which special tax bills shall be issued according to law, on the completion and acceptance of the work.

197 All the materials to be used for the work contemplated in this contract shall be subject to the inspection of the engineer, and only such materials used in the work as are in his opinion suitable and of acceptable quality.

Condemned material to be immediately removed from the vicinity of the work.

Failure or neglect on the part of the city engineer, or any of his authorized agents, to condemn or reject bad or inferior work or material shall not be construed to imply an acceptance of any work; if it may become evident at any time prior to the final acceptance of the work by the city engineer. The work herein specified to be done is not to be considered as finally accepted by the city engineer until the special tax bills are issued for the same.

The contractor shall protect from damage all water and gas pipes, hydrants and lamp posts, and reset to proper line and grade and repair any sidewalks or curbing that may become damaged or displaced at any time during the progress of the work.

Upon completion of each block in length of the work herein contemplated, the contractor shall immediately remove all materials, earth stones, and rubbish of every kind from the street, and any damage or injury done to private or public property along the street by the contractor shall be made good by him before the acceptance of this work.

Sub-grade.

The portion of the roadway indicated upon the plans to be paved shall be excavated from the present surface thereof to a sub-grade, which, when properly prepared shall be six and one-half ($6\frac{1}{2}$) inches below and parallel with the surface of the completed pavement; said completed surface shall conform to the general cross section of the street as indicated upon the plans, except at such points where there exists a difference in the level between the street railway tracks and the curbs, or between the opposite curbs themselves, or where proper drainage may require it, then the surface of the pavement may be lowered or raised within a range of six (6) inches as the engineer may direct.

The sub-grade shall be thoroughly rolled with a roller weighing not less than five (5) tons. Should such rolling develop any soft

spongy ground, the same shall be removed and such excavations and such depressions as may appear shall be refilled with suitable material and the entire subgrade be brought to an even and compact surface by rolling or ramming.

All the lumber, paving blocks or stone flagging composing the present gutters or cross-walks, that may, in the opinion of the engineer, be suitable for use by the city, shall be by the contractor removed and deposited uninjured within three hundred (300) feet of the place of excavation. Earth or other material excavated shall be used, if so directed by the engineer, for filling or grading said street or adjoining streets or alleys, provided, that the haul required of such excavated material shall not exceed six hundred (600) feet. All excavated material, except as above provided shall be at the disposition of the contractor.

Foundation.

On the sub-grade, as above prepared, there shall be placed a layer of hydraulic cement concrete of not less than four (4) inches in thickness when tamped. The concrete to be formed and placed as follows:

The concrete shall be composed of one (1) part of hydraulic cement, two (2) parts of sand, and five (5) parts of broken stone; these proportions to be established by measurement.

The cement shall be fresh, fine ground, hydraulic cement and capable of withstanding a tensile strain of one hundred (100) pounds per square inch, when mixed pure and after an exposure of one (1) day in air and six days in water. The cement shall be tested and accepted by the engineer. The contractor shall provide dry storage for the cement, and any condemned cement, or any which may become damaged, shall be immediately removed from the work.

The sand shall be clean, coarse, sharp river sand, free from loam or dirt, and shall be screened when deemed necessary by the engineer.

The stone shall be hard ledge limestone, broken so as not to exceed two ond one-half (2½) inches in their greatest dimensions. They shall be clean, free from dust and dirt, and shall be wet before being used.

198 The concrete shall be prepared in suitable boxes and shall be formed by first thoroughly mixing the proper proportion of cement and sand together dry, to which only a sufficient amount of clean water shall be added to produce a mortar of proper consistence when thoroughly worked. To this fresh mortar and proper proportion of wet stone should be added and water and stone quickly and thoroughly mixed until each stone is completely covered with mortar. The concrete shall be promptly deposited in place, without scattering, and then rammed until the mortar flushes to the surface, which surface shall conform to a plane parallel with and two and one-half (2½) inches below the finished surface of the pavement. The concrete shall be properly protected until, in the

opinion of the engineer, it is sufficiently set, and not until such time shall the pavement be laid thereon. Concrete shall not be laid when the temperature is such as, in the opinion of the engineer would injure the quality of the concrete.

The concrete shall extend close up to all openings, projections or irregularities, and be finished about the same in a neat and workmanlike manner.

Between the curb lines of any intersecting street or alley the concrete and pavement shall be finished against a white oak plank three (3) inches thick, twelve (12) inches deep and of such lengths as the engineer may designate. The upper edges of the plank to be neatly adzed off to conform to the finished surface of the pavement.

When the work joins any pavement already laid, the engineer may require the contractor to remove and relay a sufficient amount of the old pavement to form a satisfactory connecting of the two pavements.

Binder course.

Upon the base of the hydraulic cement concrete there shall be spread a binder course of bituminous concrete composed of clean broken stone not exceeding one and one-half (1½) inches in their greatest dimension, and an asphaltic cement made as hereinafter specified, the parts to be thoroughly heated and then mixed by machinery in the proportion of not less than fifteen (15) gallons of asphaltic cement to one (1) cubic yard of broken stone.

The mixture shall be spread upon the base with hot irons and rakes, and while in a hot and plastic condition, shall be rammed and rolled until it forms a compact and thoroughly bonded binder course of a thickness not less than one and one-fourth (1¼) inches with an even and uniform surface parallel with and one and one-fourth (1¼) inches below the completed surface of the pavement.

Wearing surface.

Upon the foundation thus prepared there shall be placed an asphalt wearing surface not less than one and one-fourth (1¼) inches in thickness when thoroughly compressed, which shall be manufactured and laid as follows:

The wearing surface shall be composed of:

1st. Refined Trinidad Lake asphaltum.

2nd. Heavy petroleum oil.

3rd. Clean fine sand.

4th. Pulverized carbonate of lime.

Samples of any of the materials named, or any of the mixtures made therefrom shall be furnished the city engineer when required, and he shall also have access to all branches of the works at any time.

An asphaltic cement shall be prepared by melting and mixing acceptable qualities of refined asphaltum and heavy petroleum oil

in the proportions by weight, of one hundred (100) parts pure asphalt to fifteen (15) to twenty (20) parts heavy petroleum oil.

The asphalt wearing surface shall be formed by mixing the materials as above specified in the following proportions:

Asphaltic cement from twelve (12) to fifteen (15) per cent.

Sand from eighty-three (83) to seventy (70) per cent.

Pulverized carbonate of lime from five (5) to fifteen (15) per cent.

The mixture shall be effected as follows: The asphaltic cement and sand shall be heated separately to about three hundred (300) degrees Fahrenheit. The pulverized carbonate of lime while cold, shall be mixed with the hot sand in the required proportions and to this mixture sufficient asphaltic cement, at the required temperature, shall be added to effect a thoroughly homogeneous mixture.

199 The pavement mixture thus prepared shall be delivered upon the street at a temperature of not less than two hundred and fifty (250) degrees Fahrenheit. It shall then be quickly spread by means of hot iron rakes, in such manner as to insure an even and uniform surface, and to such depth that after having received its ultimate compression, it shall have a thickness of not less than one and one-fourth (1¼) inches.

The pavement shall be ironed and rolled by hand, after which a small amount of hydraulic cement shall be swept over it, and it will then be thoroughly compressed with a steam roller, the rolling to continue as long as it makes an impression on the surface.

There shall be laid along the outside edge of all street railway tracks, a line of granite or sandstone paving blocks, not less than six (6) inches in depth, five (5) to twelve (12) inches in length, and four (4) to seven (7) inches in thickness.

General stipulations.

It is further expressly agreed between the parties hereto that this contract is made subject to the conditions and stipulations which follow:

1. The first party shall not assign or transfer this contract nor sublet any of the work embraced in it.

2. The first party shall commence work at such points as the engineer may direct, and shall conform to his directions as to the order of time in which the different parts of the work shall be done, as well as to all his other instructions as to the mode of doing the same.

3. Whenever the contractor is not present on the work, orders will be given to the superintendents or overseers in immediate charge thereof, and shall by them be received and obeyed: and if any person employed on the work shall refuse or neglect to obey the instructions of the engineer, or his duly authorized agents, in anything relating to the work, or shall appear to the engineer to be incompetent, disorderly or unfaithful, he shall, upon the requisition

of the engineer, be at once discharged and not again be employ on any part of the work.

4. Any work not herein specified, which may be fairly impli as included in this contract, of which the engineer shall be judg shall be done by the first party without extra charge.

The first party shall also do such extra work, in connection wit this contract, as the engineer may especially direct, and if it sha be of a kind for which no price is stated in this contract, such pric shall be fixed by the engineer, but no claims for extra work sha be allowed, unless the same was done in pursuance of special orde as aforesaid, and the claims presented as soon as practicable after th work is done and before the final estimate.

5. The first party shall, upon being so directed by the enginee remove, rebuild or make good, at his own cost, any work which th latter shall decide to be defective, and any omission to condem any work at the time of its construction shall not be construed a an acceptance of any defective work, but the first party shall correc any imperfect work, whenever discovered before the final accept ance of the work.

6. The work embraced in this contract shall be begun within sixty (60) days after this contract binds and takes effect, and shall be prosecuted regularly and uninterruptedly thereafter with such force as to secure its full completion within four (4) months from the date of its confirmation; the time of beginning, rate of progress, and time of completion being essential conditions of this contract. If the contractor shall fail to complete the work within the time above specified, an amount equal to the sum of ten ($10) dollars per day for each and every day thereafter, until such completion, shall be deducted as liquidated damages for such breach of this contract from the amount of the final estimate of said work.

7. If, in the opinion of the engineer, the first party, at any time during the progress of the work, is not prosecuting the work with sufficient force to insure its completion within the time specified in this contract, he may notify the first party to employ such additional force as he deems sufficient; and on the failure of said first party to comply with such notice within three (3) days after its delivery, the engineer may put on such additional force at the cost of the said first party; or he may, at his option, declare the contract annulled. But such declaration must be confirmed and ratified by ordinance before having any force or effect.

The power is reserved to the city engineer by city of Westport to suspend or annul this contract, or to suspend the doing of any work thereunder at any time for any failure on the part of the first party to fulfill the same, or for other good cause; and any action of the city engineer in suspending or annulling this contract, or suspending the doing of the work thereunder, and his decision as to the existence of cause or reason for such annulment or suspension, shall be conclusive as to the existence of such cause or reason in any controversy or litigation between the parties hereto, or others claiming

under them. If this contract be so suspended or annulled, the said first party shall not be entitled to anything on account of damages thereby, nor shall such annulment or suspension in any wise affect the right of said The City of Westport to damages and penalties claimed by it on account of the failure of said first party.

8. The first party will be required to observe all city ordinances in relation to obstructing streets, maintaining signals, keeping open passage way and protecting the same where exposed, and generally to obey all laws and ordinances controlling or limiting those engaged on the work: and the said first and second parties hereby expressly bind themselves to indemnify and save harmless the city of Westport from all suits or actions, of every name and description, brought against the said city for or on account of any injuries or damages received or sustained by any party or parties by or from the acts of the said contractor, or his servants or agents, in doing the work herein contracted for, or by, or in consequence of any negligence in guarding the same, or any improper material used in its construction, or by or on account of any act or omission by the said first party, or his servants or agents.

9. The first party further agrees that he will pay for the work and labor of all laborers, teamsters, teams and wagons employed on the work, and for all materials used therein.

10. It is further agreed that the passage of the ordinance herein above referred to, and the doing of the work embraced in this contract, without any proper petition to the board of aldermen from the real estate owners to have said work done, shall not render the city liable to pay, directly or indirectly, for such work, or any part thereof, otherwise than by the issue of special tax bills, and the said first party shall assume all risks as to the validity of such special tax bills, and take the same without recourse against the city of Westport in any event.

11. To prevent all disputes and litigations, it is further agreed by the parties hereto that the city engineer shall, in all cases, determine the amount and quantity of the several kinds of work which are to be paid for under this contract; and he shall decide all questions which may arise relative to the execution of this contract, on the part of the contractor, and his estimates and decisions shall be final and conclusive.

13. This contract is entered into subject to the approval or rejection of the board of aldermen and shall not bind until so approved, and is subject to the city charter and ordinances in general.

13. It is further expressly agreed that the city of Westport shall not be liable for any delay or stoppage of said work by reason of any injunctions or legal proceedings whatever.

14. In consideration of the completion by the said first party of all work embraced in this contract in conformity with the specifications and stipulations herein contained, City of Westport party of the third part, hereby agrees to pay to the said first party at the following rate per square yard, viz:

The sum of two ($2.00) dollars.

And the said party of the first part further agrees that he will not be entitled to receive payment for any portion of the aforesaid work or materials until the same shall have been fully completed in the manner set forth in this agreement to the satisfaction and
201 acceptance of the city engineer. And that he will then receive pay according to the above schedule of prices, in special tax bills against and upon the lands liable to be charged with the cost thereof, as provided by law, according to the charter and ordinances of said city, and that his receipt therefor shall be in full of all claims against the City of Westport on account of said work.

Said parties of the second part hereby guarantee that the said party of the first part will well and truly perform the covenant hereinbefore contained; to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work, and for all material used therein, and if the cost of such work and labor and materials is not paid in full by the said party of the first part, then the said parties of the second part hereby agree to pay for said work, labor and materials, or any part thereof, which shall not be paid by said first party within ten (10) days after the money for such work, labor and materials becomes due and payable, and this provision shall entitle any or all laborers and teamsters and owners of teams and wagons who may do work, and parties who may furnish materials on or for the improvements to be done under this contract, to sue and recover from said second parties, or either of them, the amount due and unpaid to them, or either of them, by said first party; but said second parties shall not be liable on this guarantee on account of the materials used and labor done upon said work beyond the sum of twenty-five hundred (2,500) dollars, the estimate cost of materials used and labor done upon said work.

The said parties of the second part hereby agree with City of Westport that the said party of the first part will well and faithfully perform each and all of the terms and stipulations in the foregoing contract, to be done, kept and performed on the part of the said first party, but said parties of the second part shall not be liable hereon beyond the sum of five thousand (5,000) dollars.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and seals respectively, and the City of Westport executes this contract by her city engineer.

THE BARBER ASPHALT
PAVING CO.,
By HENRY R. KASSON, [SEAL.]
Attorney in Fact. [SEAL.]

HUGH J. McGOWAN.
JOSEPH LORIE. [SEAL.]

CITY OF WESTPORT,
By H. B. ABERCROMBIE, [SEAL.]
City Engineer Thereof.

City mayor's office.

CITY OF WESTPORT, *Aug.* 2, 1897.

The securities and bond aforesaid are hereby approved as sufficient.

D. D. DRAKE, *Mayor.*

City attorney's office.

CITY OF WESTPORT, *Aug.* 2, 1897.

The foregoing contract and bond are in due form according to law and are hereby approved.

A. S. MARLEY,
City Attorney.

City clerk's office.

CITY OF WESTPORT, *Aug.* 2, 1897.

The foregoing contract and bond have been this day confirmed — board of aldermen.

By the common council of Kansas City of Westport.

Attest: G. L. LOVE, *City Clerk.*

Guarantee.

Party of the first part expressly agrees to construct the said pavement with such material and in such manner that the same shall endure without the need of any repairs for a period of (5) five years from and after the completion and acceptance thereof.

It is expressly agreed that the city engineer shall be the sole and final arbitrator to determine at any and all times within said period of five (5) years whether or not said pavement conforms to the aforesaid guarantee, and that when said engineer shall determine that any faults, defects or imperfection exists in said pavement during the period aforesaid, and he shall give the party of the first part or his agents notice thereof in writing, if the said party of the first part shall fail to make good such fault, defects or imperfection within ten (10) days after the receipt of such notice aforesaid, then this guarantee shall be held to have been broken and said party of the first part shall be liable to pay to City of Westport the cost of making good such fault, defect or imperfection.

202 When any repairs or construction of gas or water mains, or service of any sewer or connection may be necessary in said street during the life of this contract, and such construction, connection or repairs requires the tearing up of said pavement, said party

of the first part shall excavate and refill all trenches that may be required, and shall replace and repair the pavement. Such trenching and refilling shall be paid for upon the actual cost to said parties of doing said work, and such repairing shall be paid for at the price herein named for the first cost of the work of paving such street, the payment for all of which shall be made by the City of Westport.

Know all men by these presents: That we, The Barber Asphalt Paving Company as principal and Hugh J. McGowan and Joseph Lorie as securities, are firmly held and bound to City of Westport, Missouri, in the sum of five thousand ($5,000) dollars, lawful money, for the payment of which well and truly to be made we hereby bind ourselves, our heirs, executors and administrators firmly by these presents.

The conditions of the above obligations are as follows:

Whereas, the Barber Asphalt Paving Co. have guaranteed under contract with the City of Westport dated July 26th, 1897, that the asphalt pavement on Baltimore avenue from Hunter avenue to Westport avenue for the consideration and under the conditions mentioned in said contract, as provided by ordinance No. 1866, approved July 16th, 1897, shall be constructed with such materials and in such manner that the same shall endure without the need of any repairs for a period of 5 years from and after the completion and acceptance of the same.

Now, therefore, if the said pavement shall endure without the need of any repairs for a period of — years from and after the completion and acceptance, then this obligation shall be void. otherwise to be in full force and effect.

In testimony whereof we have hereunto set our hands and seals this — day of ——, 1—

THE BARBER ASPHALT PAVING CO.,
By HENRY R. KASSON, *Attorney in Fact.* [SEAL.]
HUGH J. McGOWAN. [SEAL.]
JOSEPH LORIE. [SEAL.]

City attorney's office.

THE CITY OF WESTPORT, MO., —— —, 1—.

The foregoing bond is in due form according to law and is hereby approved.

—— ——,
City Attorney.

Mayor's office.

CITY OF WESTPORT, MO., —— —, 189–.

The foregoing bond is hereby approved this — day of ——, 189–.

D. D. DRAKE, *Mayor.*

203 (Indorsement on back :) Specifications and contract City of Westport with the Barber Asphalt Paving Co. for constructing asphalt pavement on Baltimore avenue from Hunter avenue to Westport avenue. Executed Aug. 4, 1897. Confirmed by ordinance of common council No. 1888.

No. 1888.

An ordinance to confirm contract to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue.

Be it ordained by the board of aldermen of the city of Westport, as follows:

SECTION I. That the contract dated July 26th, 1897, between the Barber Asphalt Paving Company, as principal, party of the first part and Hugh J. McGowan and Joseph Lorie as securities, parties of the second part, and the City of Westport, party of the third part, for making the following city improvements, viz:

Constructing an asphalt pavement on Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue, under the provisions of ordinance No. 1866, entitled "An ordinance to pave Baltimore avenue, from the south line of Hunter avenue to the north line of Westport avenue," approved July 16th, 1897, be and the same is hereby affirmed.

SECTION II. The board of aldermen find and declare that the city engineer has made an estimate of the cost of the work mentioned and described in the contract referred to in the first section of this ordinance and heretofore submitted the same to the board of aldermen and that bids for the doing of said work have been duly advertised for according to law, and that the Barber Asphalt Paving Company is the lowest and best bidder for the work required to be done by the terms of the contract and ordinance aforesaid, and the contract for such work has been duly awarded to said Barber Asphalt Paving Company.

Approved Aug. 4th, 1897.

D. D. DRAKE,
Mayor and ex-Officio President of the Board of Aldermen.

Attest: G. L. LOVE, *City Clerk.*

WESTPORT, MO., *Nov. 17th*, 1897.

To the honorable mayor and board of aldermen of the city of Westport.

GENTLEMEN: The work of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue, under ordinance No. 1866, approved July 16th, 1897, has been completed and accepted by me as city engineer, and I have apportioned

the cost thereof against each lot or tract of land fronting on said street according to its frontage as follows:

Description of property.	Owners.	Front feet.	Amount.
Lot 1 block 1 Hyde Park.....	R. H. Keith.....	59.43	$155.10
" 2 " 1 "	"	50	130.43
" 3 " 1 "	"	50	130.43
" 4 " 1 "	"	50	130.43
" 5 " 1 "	"	50	130.43
" 6 " 1 "	C. F. Morse *et al*.. ...	50	130.43
" 7 " 1 "	"	50	130.43
" 8 " 1 "	"	50	130.43
" 9 " 1 "	"	50	130.43
" 10 " 1 "	"	50	130.43
" 11 " 1 "	"	50	130.43
" 12 " 1 "	"	50	130.43
" 13 " 1 "	"	50	130.43
" 14 " 1 "	"	50	130.43
" 15 " 1 "	"	50	130.43
" 16 " 1 "	"	50	130.43
	"	52.42	136.74
204			
" 19 " 2 "	C. F. Morse.....	52.42	136.74
" 20 " 2 "	"	50	130.43
" 21 " 2 "	"	50	130.43
" 22 " 2 "	"	50	130.43
" 23 " 2 "	"	50	130.43
" 24 " 2 "	"	50	130.43
" 25 " 2 "	"	50	130.43
" 26 " 2 "	"	50	130.43
" 27 " 2 "	"	50	130.43
" 28 " 2 "	"	50	130.43
" 29 " 2 "	"	50	130.43
" 30 " 2 "	"	50	130.43
" 31 " 2 "	"	50	130.43
" 32 " 2 "	"	50	130.43
" 33 " 2 "	"	50	130.43
" 34 " 2 "	"	50	130.43
" 35 " 2 "	"	50	130.43
" 12 " 3 "	"	26.22	68.40
" 13 " 3 "	"	59.79	171.29
" 14 " 3 "	"	50	143.25
" 15 " 3 "	"	50	143.25
" 16 " 3 "	"	50	143.25
" 17 " 3 "	"	50	143.25
" 18 " 3 "	"	50	143.25
" 19 " 3 "	"	50	143.25
" 20 " 3 "	"	50	143.25
" 21 " 3 "	"	50	143.25
" 22 " 3 "	"	50	143.25
" 1 " 4 "	"	57.37	164.37
" 2 " 4 "	"	57.37	164.37
" 3 " 4 "	"	50	143.25
" 4 " 4 "	"	50	143.25
" 5 " 4 "	"	50	143.25
" 6 " 4 "	"	50	143.25
" 7 " 4 "	"	50	143.25
" 8 " 4 "	"	50	143.25
" 9 " 4 "	"	50	143.25
" 10 " 4 "	"	50	143.25
	"	50	143.25

Description of property.					Owners.	Front feet.	Amount.
"	11	"	4	"	"	59.79	171.29
"	1	"	9	"	Hugh C. Ward, rec...	66.12	197.48
"	2	"	9	"	" ...	50	149.40
"	3	"	9	"	" ...	50	149.40
"	4	"	9	"	" ...	50	149.40
"	5	"	9	"	" ...	50	149.40
"	6	"	9	"	" ...	50	149.40
"	7	"	9	"	" ...	50	149.40
"	8	"	9	"	" ...	50	149.40
"	9	"	9	"	" ...	50	149.40
"	10	"	9	"	" ...	50	149.40
"	11	"	9	"	" ...	66.12	197.48
"	12	"	9	"	" ...	66.09	197.40
"	13	"	9	"	" ...	50	149.40
"	14	"	9	"	" ...	50	149.40
"	15	"	9	"	" ...	50	149.40
"	16	"	9	"	" ...	50	149.40
"	17	"	9	"	" ...	50	149.40
"	18	"	9	"	" ...	50	149.40
"	19	"	9	"	" ...	50	149.40
"	20	"	9	"	" ...	50	149.40
"	21	"	9	"	" ...	50	149.40
"	22	"	9	"	" ...	66.09	197.40
"	13	"	29	"	J. D. Jarvis.....	50	144.12
"	14	"	29	"	"	50	144.12
"	15	"	29	"	A. M. Thomas, Jr	50	144.12
"	16	"	29	"	Mrs. La'a K. Welden.	50	144.12
"	17	"	29	"	Addie H Beedle.....	50	144.12
"	18	"	29	"	"	41.12	118.50
"	7	"	30	"	M. Schoonmaker.....	41.06	118.33
"	8	"	30	"	"	50	144.12
"	9	"	30	"	John T. Marshall.....	50	144.12
"	10	"	30 (s½)	"	"	25	74.06
"	10	"	30 (n½)	"	Leonora W. Shelley..	25	74.06
"	11	"	30	"	" ..	50	144.12
"	12	"	30	"	" ..	50	144.12
205							
"	7	"	1	Hyde Park annex	C. M. Karges	53.4	153.92
"	8	"	1	"	"	50	144.12
"	9	"	1	"	"	50	144.12
"	10	"	1	"	Caroline B. Cheever..	50	144.12
"	11	"	1	"	Jane R. Gillette. ...	50	144.12
"	12	"	1	"	John G. Schmeding-hoff.	50	144.12
"	1	"	2	"	Hale H. Cook.....	50	144.12
"	2	"	2	"	Julia A. Clark	50	144.12
"	3	"	2	"	Andrew C. Knox....	50	144.12
"	4	"	2	"	" ...	50	144.12
"	5	"	2	"	Ella G. Mills	50	144.12
"	6	"	2	"	"	53.4	153.92
"	13	"	47	Hyde Park.....	Hugh C. Ward rec ...	48.59	136.38
"	14	"	47 (n½)	"	" ...	25	70.17
"	14	"	47 (s½)	"	R. B. Green.....	25	70.17
"	15	"	47	"	Hugh C. Ward rec ...	50	140.34
"	16	"	47	"	" ...	50	140.34
"	17	"	47	"	" ...	50	140.34
"	18	"	47	"	" ...	50	140.34
"	19	"	47	"	" ...	50	140.34
"	20	"	47	"	" ...	50	140.34

Description of property.	Owners.	Front feet.	Amount.
" 21 " 47 "	" ...	50	140.34
" 22 " 47 "	" ...	50	140.34
" 23 " 47 "	" ...	50	140.34
" 24 " 47 "	" ...	53.59	150.42
" 1 " 48 "	" ...	53.62	150.50
" 2 " 48 "	" ...	50	140.34
" 3 " 48 "	" ...	50	140.34
" 4 " 48 "	" ...	50	140.34
" 5 " 48 "	" ...	50	140.34
" 6 " 48 "	" ...	50	140.34
" 7 " 48 "	" ...	50	140.34
" 8 " 48 "	" ...	50	140.34
" 9 " 48 "	" ...	50	140.34
" 10 " 48 "	" ...	50	140.34
" 11 " 48 "	" ...	50	130.34
" 12 " 48 "	" ...	50	140.34
" 5 " 39 "	H. T. Hudson.....	48.62	136.47
" 6 " 39 "	"	50	141.96
" 7 " 39 "	R. H. Field.....	50	141.96
" 8 " 39 "	"	50	141.96
" 1 " 40 "	The City Trust Co....	60	170.35
" 2 " 40 "	"	60	170.35
" 3 " 40 "	Wm. M. Smith.....	50	141.96
" 4 " 40 "	Wm. M. Hogue.....	50	141.96
" 1 " 43 "	James W. Martin	50	141.96
" 2 " 43 "	"	50	141.96
" 3 " 43 (n 25f.)	"	50	141.96
" 3 " 43 (s 25f.)	Hannah G. Groves...	25	70.88
" 4 " 43 "	"	25	70.88
" 5 " 43 "	Frank C. Groves.....	50	141.96
" 6 " 43 "	"	50	141.96
" 7 " 44 "	H. C. Ward, rec.....	48.62	138.12
" 8 " 44 "	"	48.59	138.00
" 9 " 44 "	"	50	141.96
" 10 " 44 "	"	50	141.96
" 11 " 44 "	"	50	141.96
" 12 " 44 "	"	50	141.96
" 6 " 45 "	"	50	141.95
" 7 " 45 "	Tr. 1st Baptist church.	55.19	146.72
" 8 " 45 "	"	50	132.92
" 9 " 45 "	R. H. Field...	50	132.92
" 10 " 45 "	"	50	132.92
" 1 " 46 "	"	50	132.92
" 2 " 46 "	Frank C. Wornall ...	50	132.92
" 3 " 46 "	"	50	132.92
" 4 " 46 "	"	50	132.92
" 5 " 46 "	"	50	132.92
" 1 " 49 "	"	55.22	146.80
" 2 " 50 (n 83.42 ft)	R. H. Field.....	98.62	180.00
" 2 " 50 (s 15.17 ft)	H. C. Ward, rec	83.42	236.85
" 6 " 1 Cor. plat of am'd plat.	R. H. Field.....	15.17	43.07
	Eliy Salmon.....	178.70	475.05
" 7 " 1 plat of Mendell's	W. A. Wilson...	80	212.67
" 8 " 1 Murry Hill.....	Amelia V. Jewett....	80	212.67
" 1 " 2 "	L. T. H. Birdsell.....	80	212.67
" 2 " 2 "	W. A. Wilson.....	80	212.67

Description of property.	Owners.	Front feet.	Amount.
206			
" 3 " 2 "	Chas. R. Rockwell ...	52.65	139.96
" 4 " 2 "	C. E. Finlay Co.....	160	425.29
		8769.33	$24512.00

Respectfully submitted.

H. B. ABERCROMBIE,
City Engineer.

No. 2046.

An ordinance levying a special assessment and for the issue of tax bills in payment for paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue.

Be it ordained by the board of aldermen — the city of Westport, as follows:

SEC. 1. That the report of the city engineer to the effect that the work of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue, has been completed and by him accepted and the cost thereof apportioned as stated in said report, is hereby received, ordered filed and approved, and said report shall be by the city clerk attached to this ordinance and is hereby expressly referred to and made a part hereof.

SEC. 2. A special assessment is hereby levied and made against the respective lots and tracts of land described in said report for the respective amounts named therein, and the city engineer is hereby ordered to make out and certify special tax bills for said special assessment against said lots and for the amount stated in said report; said tax bills to be issued in favor of the Barber Asphalt Paving Company, the contractor with the city for doing the said work. And said tax bills shall be issued and executed according to law, and shall bear interest at the rate of eight per cent. per annum until paid.

In cases where the owners have notified the city clerk, as required by law, that they desire said bills to be issued in installments, the same shall be so issued by the city engineer according to law, and said installment bills shall bear interest from the date of issue at the rate of six per cent. per annum.

SEC. 3. Said tax bills shall be registered by the city clerk in his office, and shall by him be delivered to the parties in whose favor issued, and he shall take the receipt of such party or parties in full for all claims against the city on account of said work.

SEC. 4. Any owner or person interested in any of the lots or parcels of land against which said tax bills are issued may pay the amount of any such tax bill together with accrued interest thereon to the date of payment to the city clerk, and the city clerk shall cancel the record of the same in his office, and the lot or tract of land described in said tax bills so paid shall then stand released and free of the lien of such tax bill, and the clerk shall pay the amount so collected on such tax bill to the owner or holder thereof upon presentation of such bill, and shall then cancel said bill and file and keep the same as a part of the records of the office.

Approved Nov. 18th, 1897.

D. D. DRAKE,
Mayor and ex-Officio President of the Board of Aldermen.

Attest: G. L. LOVE, *City Clerk.*

207 By Mr. SCARRITT:

Q. The names appearing on the petition to pave Baltimore avenue were residents of the city of Westport at the time this petition was filed, were they not, Doctor?

A. I think every one of them, yes sir.

Q. Now you spoke of some 25 houses being built on that part of the street improved, since the petition was filed,—state whether or not the ground on which those houses were built, some of the lots on which the houses were built, have been sold once or twice since these improvements were made?

Counsel for the complainant objects to the question as immaterial.

A. I know that some of it has been sold. I do not know how much or how often.

Q. Well the houses were not built by the persons who owned the land at the time this petition was signed, were they?

A. No sir.

Q. The land was sold and then the owner put up the houses?

A. The land was sold, a large portion of it, to the Finley Company, Dr. Whittier and another company they have got there,—they are all together, and they bought the land first and built the houses as I understand, and then they sold them since to other parties.

Q. A great deal, if not all of it, has been sold a second time?

A. It has been sold a second time I think.

By Mr. FIELD:

Q. Sold under the mortgage do you mean?

By Mr. SCARRITT:

Q. To satisfy Judge Field,—was any sold under mortgage?

A. I do not know of any sold under a mortgage.
Q. Has any of it very materially advanced in value since the street was paved?

Counsel for complainant objects as immaterial.

A. Yes sir, I think so.

208 Re-direct-examination by Mr. FIELD:

Q. Doctor do you know of any person outside of Thomas H. Mastin, who was in the hands of a receiver, selling any property, who owned the same at the time of the paving on Baltimore avenue?
A. Yes, I know one case, one lot, Captain Hoge of Boonville, between 38th and 39th, sold a lot.
Q. Outside of Captain Hoge selling one lot do you know of any other sold except owned by the Mastin estate?
A. Yes, sir, all the lots of Murray Hill were sold to the Finley Company. Professor Jacquemot owned some of it,—I do not know how many lots, six or eight of them.
Q. Finley got that property pretty cheap, didn't he?
A. I do not know. William A. Wilson owned some of it and I understood he held it pretty stiff.
Q. You never heard of Finley paying any large price?
A. Well, he never paid any more than he had to.
Q. Did you ever know of him paying any more than $30 a foot for a single lot out there?
A. I do not know.
Q. You did not know he bought it for about $22.50 or $27.50 a foot?
A. I do not know.
Q. And they had already paid the cost of the pavement?

Counsel for defendant objects to the question as calling for secondary evidence.

A. I do not know.

By Mr. FIELD:

Q. I show you now, Doctor, what purports to be a petition that was filed with you as city clerk, for the pavement of Wyandotte street,—is that the paper?
A. Yes sir, filed July 15th, 1897.
Q. I will ask you to enumerate the names of people on Wyandotte street, of people who did not reside on lots fronting on that street at that time?

209 A. There is Charles F. Morse, Charles J. Hubbard, Hugh C. Ward, receiver, Thomas H. Mastin, Jennie A. Stilwell, L. W. Lear, W. A. Rule, and I don't think, I wouldn't be positive that Olive Brighton and Kate M. Hayde were not residents on the street at that time.

Q. Well were they residents of Westport?
A. I think likely they were.
Q. You know whether or not some of them were, don't you?
A. Yes. I am not positive about those two. I think they are both living there on the street now. At that time I am not positive where they lived.
Q. Live on Wyandotte street?
A. Yes sir.
Q. Well the other names you have given did not reside on that street but did reside in the city of Westport?
A. Yes sir.
Q. Now the names of those you have not called who did reside on the street at that time,—just count them without naming them.
A. Fifteen of them.
Q. Now you do not remember whether or not there was a remonstrance against that pavement on Wyandotte?
A. I am not clear on that but I rather think there was a protest or something of that kind put in there against that paving.
Q. It was overruled on the ground that the majority of the residents along there in the city of Westport had not signed it?
A. I think that is it.
Q. How did the board of aldermen of Westport act on that matter of names on petitions?—did they count the persons or amount of land represented?

Counsel for the defendant objects to the question as immaterial, incompetent and irrelevant. In order to show the action of the municipal authorities it must be by the records of the board.

A. The number of people, not the frontage.

Counsel for defendant moves to strike out the answer as incompetent, irrelevant and immaterial.

210 Q. Is that answer true also as to Main street and Baltimore avenue in question?
A. It is in every petition for public improvements.
Q. That was the construction placed upon the law?
A. Yes sir.
Q. And did they count a man who resided in Westport signing the petition regardless of whether he resided on the property on the proposed improvement just the same as if he did reside on property fronting on the proposed improvement?
A. Just so he resided in the city it was the same as if on the property, "a resident property owner."

By Mr. FIELD: (1.) I offer in evidence the petition referred to by the witness for the paving of Wyandotte street, and the file marks thereon,

(2.) Also the resolution declaring the work of paving Wyandotte street necessary, adopted July 15th, 1897.

(3.) Also ordinance number 1931 ordering the pavement of Wyandotte street, approved September 3, 1897.

(4.) I also offer in evidence the contracy made by the city engineer in behalf of the city of Westport for this pavement, including specifications.

(5.) I also offer in evidence ordinance number 1949 of the mayor and board of aldermen of Westport confirming this contract.

(6.) I also offer in evidence report of the city engineer as to the apportionment of the cost of Wyandotte Street paving under the ordinance, resolution and contract aforesaid.

(7.) I also offer in evidence the ordinance of the mayor and board of aldermen of Westport levying assessments for the Wyandotte Street paving aforesaid, approved November 18th, 1897.

Which said petition resolution, ordinances, contract and report read as follows:

211 Board of aldermen of the city of Westport, Jackson county, Missouri:

The undersigned, real estate owners and residents of the city of Westport, respectively own the real estate on Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue, described opposite their names, by them hereto subscribed, and hereby petition the board of aldermen of the city of Westport to adopt a resolvtion declaring it to be necessary to pave Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue, all in said city of Westport.

Said work or improvement to consist as follows, to-wit:

The street to be paved the full width thereof, exclusive of side walks of legally established widths, with a genuine Trinidad Lake asphalt pavement to be lain as follows: The base to consist of broken stone laid on the present macadam of such thickness as to bring said base up to within three (3) inches of the finished surface of the pavement, upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone, upon this shall be laid a binder course of bituminous concrete 1½ inches in thichness, upon this shall be laid a wearing surface 1½ inches in thickness, the matrix of which shall be made of refined Trinidad Lake asphalt. The total cost of the pavement not to exceed the sum of $2.10 per square yard. The pavement to be constructed of such materials and in such a manner that it shall endure without the need of any repairs for a period of five (5) years after the completion thereof.

Attesting witness.	Owners' names.	Description of real estate.
John C. Tate.....	Charles F. Morse..	Lots 17 to 27 inclusive block 1 Hyde Park.
	Charles J. Hubbard	Lots 12 to 22 inclusive block 4 Hyde Park.
	Hugh C. Ward, rec Thomas H. Mastin	Lots 1 to 9 inclusive block 5 Hyde Park.

Attending witness.	Owner's name.	Description of real estate.
Wm. Norris.....	Susan H. Jones ...	Lot 11 and s. 10 ft. of lot 18 blk. 5 Hyde Park.
		Lots 1 to 8 inclusive and Lots 10 and 11 blk. 8 Hyde Park.
		Lots 12 to 22 inclusive block 9 Hyde Park.
John C. Tate	Hugh C. Ward, receiver, Thomas H. Mastin.	Lots 13 to 24 inclusive block 48, Hyde Park.
		Lts. 11 and 12 block 43 Hyde Park.
Wm. Norris.....	Hiram Barkley	North 40 ft. lot 10 block 5, Hyde Park. Lot 6 blk. 23 Hyde Park.
Wm. Norris.....	John E. Cole.... ..	Lots 7-8-9 block 2, Hyde Park annex.
J. B. McGowan.....	R. H. Keith	Lots 7-8-9-10, block 23 Hyde Park.
Wm. Norris.....	Esther C. Stewart..	Lots 31, 30, 29, 28, block 1, Hyde Park.
Wm. Norris.....	Nellie A. Marquis..	Lt. 11 blk. 2 Hyde Pk. annex.
Wm. Norris.....	Jennie A. Stillwell..	Lt. 10 blk. 2 Hyde Pk. annex.
Wm. Norris.....	By A. E. Stillwell, att'y.	Lot 7 blk. 40, Hyde Park. Lot 7 blk. 40, Hyde Park.
Wm. Norris.....	Lizzie B. Wilcox...	Lot 7 blk. 40, Hyde Park.
Wm. Norris.....	By B. Wilcox.....	Lot 6 blk. 40, Hyde Park.
Wm. Norris.....	C. C. Peters.....	So. 40 ft. lt. 2 Hanover Pl.
Wm. Norris.....	L. W. Lear.	Lt. 1 and N. 10 ft. lot 2.
Wm. Norris.....	Geo. W. Lee.....	Lots 1, 2, and 3 Arnold's res. of cross add.
Wm. Norris.....	Laura A. Lee	
Wm. Norris.....	C. H. Patterson... .	Lot 6 blk. 41 Hyde Park.
Wm. Norris.....	L. C. Penfield.....	Lt. 6 Arnolds resurvey of cross add.
Wm. Norris.....	Olive Bracken.....	Lot 3 Hanover Place.
Wm. Norris.....	A. J. McDonald ...	Lot 5 blk. 23, Hyde Park.
Wm. Norris.	Geo. W. Pfahler....	N. 50 ft. of S. 132½ of N. 232½ L. 7 Jno. Harris est.
Wm. Norris.....	Katie M. Dayde....	Lot 4 Hanover Place.
Wm. Norris..	W. A. Rule.....	75 ft. lot 1 and 2 H. & Etlings allotment.

Mo., ——, 189–.

We hereby certify the names signed to the foregoing petition represent a majority of the front feet of real estate owned by residents of city of Westport and fronting on —— to – –.

—— ——,
City Engineer.
—— ——.
—— ——.
—— ——.
—— ——.

212

Filing on back.

Petition Charles F. Morse *et al.* to adopt a resolution to pave Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue with Trinidad Lake asphalt.

Presented *by* filed July 15, 1897.

G. L. LOVE, *City Clerk.*

No. 590.

A resolution declaring the work of paving Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue to be necessary.

Be it resolved by the board of aldermen of the city of Westport, That it is necessary to pave Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue in the city of Westport, to the full width thereof exclusive of sidewalks of legally established width, the pavement to consist as follows, to-wit:

A genuine Trinidad Lake asphalt pavement: The base to consist of broken stone laid on the present macadam of such thickness as to bring said base up to within three inches of the finished surface of the pavement, upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone. Upon this base shall be laid a binder course of bituminous concrete one and one-half inches in thickness, upon this shall be laid a wearing surface one and one-half inches in thickness, the matrix of which shall be composed of genuine Trinidad Lake asphalt; the total cost of the pavement not to exceed the sum of two dollars and ten cents ($2.10) per square yard; the pavement to be constructed of such materials and in such a manner, that it shall endure without the need of repairs for a period of five years after the completion thereof, the whole work to be done in conformity with the plans and specifications therefor, on file in the office of the city engineer and the board of aldermen hereby declare such work necessary to be done.

Adopted July 15th, 1897.

G. L. LOVE, *City Clerk.*

No. 1931.

An ordinance to pave Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue.

Be it ordained by the board of aldermen of the city of Westport, as follows:

SECTION I. That Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue, in the city of Westport, be paved to the full width thereof, exclusive of sidewalks of legally established width.

SECTION II. The work shall consist of the materials and be laid in the manner following, viz.: The pavement shall consist as follows to-wit: A genuine Trinidad Lake asphalt pavement: the base to consist of broken stone laid on the present macadam
213 of such thickness as to bring said base up to within three inches of the finished surface of the pavement; upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone; upon this shall be laid a binder course of bituminous concrete one and one-half ($1\frac{1}{2}$) inches in thickness; upon this shall be laid a wearing surface one and one-half ($1\frac{1}{2}$) in thickness,

the matrix of which shall be composed of genuine Trinidad Lake asphalt; the total cost of the pavement not to exceed the sum of two and 10-100 dollars per square yard; the pavement to be constructed of such materials and in such manner that it shall endure without the need of repairs for a period of five years after the completion thereof; the whole work to be done in conformity with the plans and specifications therefor on file in the office of the city engineer.

SECTION III. The work shall be completed within four months from the time a contract therefor binds and takes effect, and when the said work shall have been completed the same shall be accepted by the city engineer and shall be paid for in special tax bills to be issued against and upon the land that may be charged with the cost thereof according to law, all of which work the board of aldermen deem necessary to have done.

SECTION IV. In addition to a sufficient bond guaranteeing the payment of all laborers employed on the work and for all materials used therein a separate bond shall be executed to the city of Westport in the sum of eight thousand ($8,000) dollars, conditioned that *that* the said street pavement herein provided for shall be constructed of such materials and in such a manner that the same shall endure without the need of repairs for a period of five years after the completion thereof which bond shall have good and sufficient security to be approved by the mayor of the city, and the form thereof shall be approved by the city attorney.

SECTION V. The board of aldermen find and declare that a majority of the resident owners of the property liable to taxation for the work or improvement described in sections one and two of thir ordinance, have not within ten days from the date of the last publication and insertion of the resolution declaring such work or improvement necessary to be done, in the Sentinel-Examiner, a newspaper printed and published in the city of Westport, or at any other time, filed with the city clerk their protest against said work or improvement, but that a majority of such resident owners have petitioned to have such part of said street, mentioned in section I, of this ordinance, paved and improved as hereinbefore provided.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Approved Sept. 3rd, 1897.

D. D. DRAKE,
Mayor and ex-Officio President of the Board of Aldermen.

Attest: G. L. LOVE, *City Clerk.*

214 Indorsement on back.

Filed in this office July 15th, 1897.

H. B. ABERCROMBIE,
City Engineer.

Filed Sept. 3rd, 1897.

G. L. LOVE, *City Clerk.*

Contract and Specifications

For constructing asphalt pavement on Wyandotte street from Hunter avenue to Westport avenue.

Approximate estimate, 15,500 sq. yds.

City, 1897.

Contract and specifications for constructing asphalt pavement on Wyandotte street, the full width thereof exclusive of sidewalks of legally established width, from the south line of Hunter avenue to the north line of Westport avenue.

This contract made and entered into this 11th day of September, 1897, by and between The Barber Asphalt Paving Company as principal and party of the first part and Hugh J. McGowan and W. C. Glass, as securities parties of the second part; and The City of Westport, party of the third part.

Witnesseth: That whereas, the said party of the first part is the lowest and best bidder for making, under provisions of ordinance No. 1931, entitled "An ordinance to pave Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue. Approved Sept. 3rd, 1897. The following city improvements, viz.: Constructing and guaranteeing for a period of five years, an asphalt pavement on Wyandotte street, the full width thereof exclusive of sidewalks of legally established width from the south line of Hunter avenue to the north line of Westport avenue.

The pavement to consist as follows, to-wit:

A genuine Trinidad Lake asphalt pavement: The base to consist of broken stone laid on the present macadam of such thickness as to bring said base up to within three inches of the finished surface of the pavement upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone. Upon this shall be laid a binder course of bituminous concrete one and one-half (1½) inches in thickness, upon this shall be laid a wearing surface one and one-half (1½) inches in thickness, the matrix of which shall be composed of genuine Trinidad Lake asphalt, the total cost of the pavement not to exceed the sum of two dollars and ten cents ($2.10) per square yard; the pavement to be constructed of such materials and in such manner that it shall endure without the need of repairs for a period of five years after the *the* completion thereof; the whole work to be done in conformity with the plans and specifications therefor on file in the office of the city engineer.

Now, therefore, the said party of the first part does hereby agree and bind himself, his heirs executors and assigns, to furnish all the material and do all the work necessary to perform the work
215 above mentioned, according to the terms of said ordinance No. 1931, and in conformity to the specifications hereinafter contained and made part of this contract, and to the satisfaction and acceptance of the city engineer of the city of Westport, and the said

party of the first part does hereby guarantee that the work herein mentioned shall be constructed with such materials and in such manner that the same shall endure without the need of any repairs for a period of 5 years, from and after the completion and acceptance of the same, without further compensation than that provided for in this contract for the first cost of said work, and the acceptance of the work done hereunder and the issue of special tax bills in payment therefor shall not be held to prevent the maintenance of an action on the contractor's bond for failure to construct said work with such materials and in such manner that the same shall endure without the need of any repairs for the required period.

Specifications for constructing and guaranteeing for a period of — years an asphalt pavement on Wyandotte street the full width thereof, exclusive of sidewalks of legally established width, from the south line of Hunter avenue to the north line of Westport avenue.

Whenever the term "contractor" or pronoun in place thereof occurs in this agreement, it is understood to mean the party or parties of the first part to this contract. And whenever the term "city engineer" or "engineer" occurs, it is understood to mean the city engineer of the city of Westport.

The work herein contemplated, shall be commenced at such point or points, and prosecuted in such manner, and with such force as the city engineer may direct.

Work to be commenced within 60 days from the time contract binds and takes effect, and all the work completed to the satisfaction and acceptance of the city engineer, within four (4) months after the date of the confirmation of this contract. Working days to include all days, excepting only Sundays and legal holidays.

In case the contractor shall fail to complete all the work herein contemplated, in accordance with the terms of these specifications within four (4) months as aforesaid, the city engineer shall deduct from the aggregate amount due according to the considerations of this contract an amount equal to ten (10) dollars per day for each and every working day after said four (4) months that the work is not completed as aforesaid.

No allowance will be made for additional time for the completion of this contract unless the contractor shall be delayed or restrained from prosecuting the work, or any and every part thereof, or unless the time is extended by the written order of the city engineer and then only for the number of days stated in such order.

The contractor shall employ only competent foremen and skilled laborers, and shall promptly discharge any man or men who refuse to obey the orders of the city engineer, or his authorized agent, or any one considered by him incompetent or disorderly.

The contractor shall not let or transfer this contract, or any part thereof, (excepting only for the delivery of materials), without the consent in writing of the city engineer. No sub-contract shall

under any circumstances, relieve the contractor of his liabilities and obligations under this contract, should sub-contractor fail to perform the work undertaken by him, in a satisfactory manner.

Contractor will be entitled to all the space between the outside rail of the railroad track and the curb, either on one side or the other of the street (but not on both sides at any one time), between such points as may be indicated by the engineer. Contractor may also occupy all the sidewalk for depositing material, only excepting six (6) feet next to the street line. Where there are no street railways, contractor may,, at the option of the engineer, occupy the full width of the roadway under such conditions as may be expressed by the engineer.

The general use of cross streets for breaking stone is prohibited, except in such instances where, in the opinion of the engineer, no inconvenience to the public use of such streets will result.

216 Contractor shall, during the progress of the work, maintain a good passable sidewalk, at least six (6) feet wide, next to the street line or elsewhere, as may be indicated. Also, shall put down and maintain suitable temporary cross-walks at street intersections.

Contractor shall put up and maintain sufficient lights at night, suitable barricades, and take any other and all proper precautions to guard against damage or injury to persons or property, and interfere as little as practicable with the use of said street.

The term "grade" used in these specifications, is understood to refer to and indicate the legally established grade of the street.

The price per square yard of pavement, as hereinafter mentioned, includes and is in full compensation for all the labor, material, tools or supplies of whatever nature that are employed or used in the prosecution, construction, preservation, or in any manner whatsoever stated, implied or involved in the proper execution and protection of the work herein contemplated, according to the terms and conditions of this contract and specifications.

The city engineer may appoint an inspector who shall represent him on this work, and any orders he may give relative to any detail of the work shall have the same force and effect as if given by the city engineer in person.

The plans and specifications on file in the office of the city engineer relating to the work herein contemplated, and all plans which may be made by the city engineer subsequent to the date of this contract, of an explanatory nature thereto, are understood to be a part of this contract and specifications.

The amount due contractor for work done under this contract shall be determined by the city engineer who shall measure the work and determine the actual quantity of work done and aggregate sum due, according to the price herein named as consideration for doing the work. And this aggregate sum, less any and all deductions which the city engineer is empowered or instructed to make in accordance with the terms of this contract and specifications, shall in event of the faithful performance and due acceptance

of the work, constitute the whole amount due under this contract, and for which special tax bills shall be issued according to law, on the completion and acceptance of the work.

All the materials to be used for the work contemplated in this contract shall be subject to the inspection of the engineer, and only such materials used in the work as are in his opinion suitable and of acceptable quality.

Condemned material to be immediately removed from the vicinity of the work.

Failure or neglect on the part of the city engineer, or any of his authorized agents, to condemn or reject bad or inferior work or material shall not be construed to imply an acceptance of any work; if it may become evident at any time prior to the final acceptance of the work by the city engineer. The work herein specified to be done is not to be considered as finally accepted by the city engineer until the special tax bills are issued for the same.

The contractor shall protect from damage all water and gas pipes, hydrants and lamp posts, and reset to proper line and grade and repair any sidewalks or curbing that may become damaged or displaced at any time during the progress of the work.

Upon completion of each block in length of the work herein contemplated, the contractor shall immediately remove all materials, earth stones, and rubbish of every kind from the street, and any damage or injury done to private or public property along the street by the contractor shall be made good by him before the acceptance of this work.

Sub-grade and foundations.

The portion of the roadway to be paved shall be excavated from the present surface thereof to a depth of three (3) inches below and parallel to the surface or the completed pavement. When the surface of the present macadam is below a plain parallel to and three (3) inches below the surface of the completed pavement broken stone shall be laid on the present macadam of such thickness as to bring said base to within three (3) inches of the finished surface of the pavement, and upon this broken stone shall be poured one (1) gallon of asphaltic cement to each square yard thereof.

Between the curb lines of any intersecting street or alley the concrete and pavement shall be finished against a white oak
217 plank three (3) inches thick, twelve (12) inches deep and of such lengths as the engineer may designate. The upper edges of the plank to be neatly adzed off to conform to the finished surface of the pavement.

When the work joins any pavement already laid, the engineer may require the contractor to remove and relay a sufficient amount of the old pavement to form a satisfactory connecting of the two pavements.

Binder course.

Upon the base as above prepared there shall be spread a binder course of bituminous concrete composed of clean broken stone not exceeding one and one-half (1½) inches in their greatest dimension, and an asphaltic cement made as hereinafter specified, the parts to be thoroughly heated and then mixed by machinery in the proportion of not less than fifteen (15) gallons of asphaltic cement to one (1) cubic yard of broken stone.

The mixture shall be spread upon the base with hot irons and rakes, and while in a hot and plastic condition, shall be rammed and rolled until it forms a compact and thoroughly bonded binder course of a thickness not less than one and one-half (1½) inches with an even and uniform surface parallel with and one and one-half (1½) inches below the completed surface of the pavement.

Wearing surface.

Upon the foundation thus prepared there shall be placed an asphalt wearing surface not less than one and one-half (1½) inches in thickness when thoroughly compressed, which shall be manufactured and laid as follows:

The wearing surface shall be composed of:

1st. Refined Trinidad Lake asphaltum.

2nd. Heavy petroleum oil.

3rd. Clean fine sand.

4th. Pulverized carbonate of lime.

Samples of any of the materials named, or any of the mixtures made therefrom shall be furnished the city engineer when required, and he shall also have access to all branches of the works at any time.

An asphaltic cement shall be prepared by melting and mixing acceptable qualities of refined asphaltum and heavy petroleum oil in the proportions by weight, of one hundred (100) parts pure asphalt to fifteen (15) to twenty (20) parts heavy petroleum oil.

The asphalt wearing surface shall be formed by mixing the materials as above specified in the following proportions:

Asphaltic cement from twelve (12) to fifteen (15) per cent.

Sand from eighty-three (83) to seventy (79) per cent.

Pulverized carbonate of lime from five (5) to fifteen (15) per cent.

The mixture shall be effected as follows: The asphaltic cement and sand shall be heated separately to about three hundred (300) degrees Fahrenheit. The pulverized carbonate of lime while cold, shall be mixed with the hot sand in the required proportions and to this mixture sufficient asphaltic cement, at the required temperature, shall be added to effect a thoroughly homogeneous mixture.

The pavement mixture thus prepared shall be delivered upon the street at a temperature of not less than two hundred and fifty (250) degrees Fahrenheit. It shall then be quickly spread by means of

hot iron rakes, in such manner as to insure an even and uniform surface, and to such depth that after having received its ultimate compression, it shall have a thickness of not less than one and one-half (1½) inches.

The pavement shall be ironed and rolled by hand, after which a small amount of hydraulic cement shall be swept over it, and it will then be thoroughly compressed with a steam roller, the rolling to continue as long as it makes an impression on the surface.

The gutters for a width of twelve (12) inches next to the curb shall receive a coating of hot, pure asphalt.

There shall be laid along the outside edge of all street railway tracks, a line of granite or sandstone paving blocks not less than six (6) inches in depth, five (5) to twelve (12) inches in length, and four (4) to seven (7) inches in thickness.

218 General stipulations.

It is further expressly agreed between the parties hereto that this contract is made subject to the conditions and stipulations which follow:

1. The first party shall not assign or transfer this contract nor sublet any of the work embraced in it.

2. The first party shall commence work at such points as the engineer may direct, and shall conform to his directions as to the order of time in which the different parts of the work shall be done, as well as to all his other instructions as to the mode of doing the same.

3. Whenever the contractor is not present on the work, orders will be given to the superintendents or overseers in immediate charge thereof, and shall by them be received and obeyed: and if any person employed on the work shall refuse or neglect to obey the instructions of the engineer, or his duly authorized agents, in anything relating to the work, or shall appear to the engineer to be incompetent, disorderly or unfaithful, he shall, upon the requisition of the engineer, be at once discharged and not again be employed on any part of the work.

4. Any work not herein specified, which may be fairly implied as included in this contract, of which the engineer shall be judge, shall be done by the first party without extra charge.

The first party shall also do such extra work, in connection with this contract, as the engineer may especially direct, and if it shall be of a kind for which no price is stated in this contract, such price shall be fixed by the engineer, but no claims for extra work shall be allowed, unless the same was done in pursuance of special orders, as aforesaid, and the claims presented as soon as practicable after the work is done and before the final estimate.

5. The first party shall, upon being so directed by the engineer, remove, rebuild or make good, at his own cost, any work which the latter shall decide to be defective, and any omission to condemn any work at the time of its construction shall not be construed as an acceptance of any defective work, but the first party shall correct any

imperfect work, whenever discovered before final acceptance of the work.

6. The work embraced in this contract shall be begun within sixty (60) days after this contract binds and takes effect, and shall be prosecuted regularly and uninterruptedly thereafter with such force as to secure its full completion within four (4) months from the date of its confirmation; the time of beginning, rate of progress, and time of completion being essential conditions of this contract. If the contractor shall fail to complete the work within the time above specified, an amount equal to the sum of ten ($10) dollars per day for each and every day thereafter, until such completion, shall be deducted as liquidated damages for such breach of this contract from the amount of the final estimate of said work.

7. If, in the opinion of the engineer, the first party, at any time during the progress of the work, is not prosecuting the work with sufficient force to insure its completion within the time specified in this contract, he may notify the first party to employ such additional force as he deems sufficient; and on the failure of said first party to comply with such notice within three (3) days after its delivery, the engineer may put on such additional force at the cost of the said first party; or he may, at his option, declare the contract annulled. But such declaration must be confirmed and ratified by ordinance before having any force or effect.

The power is reserved to the city engineer by City of Westport to suspend or annul this contract, or to suspend the doing of any work thereunder at any time for any failure on the part of the first party to fulfill the same, or for other good cause; and any action of the city engineer in suspending or annulling this contract, or suspending the doing of the work thereunder, and his decision as to the existence of cause or reason for such annulment or suspension, shall be conclusive as to the existence of such cause or reason in any controversy or litigation between the parties hereto, or others claiming under them. If this contract be so suspended or annulled, the said first party shall not be entitled to anything on account of damages thereby, nor shall such annulment or suspension in any wise affect the right of said City of Westport to damages and penalties claimed by it on account of the failure of said first party. But said abatement or annulment or suspension must be ratified by ordinance before being of any force or effect.

219 8. The first party will be required to observe all city ordinances in relation to obstructing streets, maintaining signals, keeping open passage way and protecting the same where exposed, and generally to obey all laws and ordinances controlling or limiting those engaged on the work: and the said first and second parties hereby expressly bind themselves to indemnify and save harmless the City of Westport from all suits or actions, of every name and description, brought against the said city for or on account of any injuries or damages received or sustained by any party or parties by or from the acts of the said contractor, or his servants or agents, in doing the work herein contracted for, or by, or in consequence of

any negligence in guarding the same, or any improper material used in its construction, or by or on account of any act or omission by the said first party, or his servants or agents.

9. The first party further agrees that he will pay for the work and labor of all laborers, teamsters, teams and wagons employed on the work, and for all materials used therein.

10. It is further agreed that the passage of the ordinance herein above referred to, and the doing of the work embraced in this contract, without any proper petition to the board of aldermen from the real estate owners to have said work done, shall not render the city liable to pay, directly or indirectly, for such work, or any part thereof, otherwise than by the issue of special tax bills, and the said first party shall assume all risks as to the validity of such special tax bills, and take the same without recourse against the City of Westport in any event.

11. To prevent all disputes and litigations, it is further agreed by the parties hereto that the city engineer shall, in all cases, determine the amount and quantity of the several kinds of works which are to be paid for under this contract; and he shall decide all questions which may arise relative to the execution of this contract, on the part of the contractor, and his estimates and decisions shall be final and conclusive.

12. This contract is entered into subject to the approval or rejection of the board of aldermen and shall not bind until so approved, and is subject to the city charter and ordinances in general.

13. It is further expressly agreed that the City of Westport shall not be liable for any delay or stoppage of said work by reason of any injunction or legal proceedings whatever.

14. In consideration of the completion by the said first party of all work embraced in this contract in conformity with the specifications and stipulations herein contained, City of Westport party of the third part, hereby agrees to pay to the said first party at the following rate per square yard, viz:

The sum of one (1) dollar and ninety (90) cents.

And the said party of the first part further agrees that he will not be entitled to receive payment for any portion of the aforesaid work or materials until the same shall have been fully completed in the manner set forth in this agreement to the satisfaction and acceptance of the city engineer. And that he will then receive pay according to the above schedule of prices, in special tax bills against and upon the lands liable to be charged with the cost thereof, as provided by law, according to the charter and ordinances of said city, and that his receipt therefor shall be in full of all claims against the City of Westport on account of said work.

Said parties of the second part hereby guarantee that the said party of the first part will well and truly perform the covenant hereinbefore contained; to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work, and for all material used therein, and if the cost of such work and labor and materials is not paid in full by the said party of the first part, then

the said parties of the second part hereby agree to pay for said work, labor and materials, or any part thereof, which shall not be paid by said first party within ten (10) days after the money for such work, labor and materials becomes due and payable, and this provision shall entitle any or all laborers and teamsters and owners of teams and wagons who may do work, and parties who may furnish materials on or for the improvements to be done under this contract, to sue and recover from said second parties, or either of them, the amount due and unpaid to them, or either of them, by said
220 first party; but said second parties shall not be liable on this guarantee on account of the materials used and labor done upon said work beyond the sum of five thousand (5,000) dollars, the estimate cost of materials used and labor done upon said work.

The said parties of the second part hereby agree with the City of Westport that the said party of the first part will well and faithfully perform each and all of the terms and stipulations in the foregoing contract, to be done, kept and performed on the part of the said first party, but said parties of the second part shall not be liable hereon beyond the sum of thirty thousand (30,000) dollars.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and seals respectively, and City of Westport executes this contract by her city engineer.

THE BARBER ASPHALT PAVING CO., [SEAL.]
By HENRY R. KASSON, *Attorney in Fact.* [SEAL.]
HUGH J. McGOWAN.
W. C. GLASS. [SEAL.]
CITY OF WESTPORT,
By H. B. ABERCROMBIE, *City Engineer Thereof.* [SEAL.]

Mayor's office.

CITY OF WESTPORT, *Sept.* 22, 1897.

The securities and bond aforesaid are hereby approved as sufficient.

D. D. DRAKE, *Mayor.*

City attorney's office.

CITY OF WESTPORT, Mo., *Sept.* 22, 1897.

The foregoing contract and bond are in due form according to law and are hereby approved.

A. S. MARLEY,
City Attorney.

City clerk's office.

KANSAS CITY, Mo., *Sept.* 22, 1897.

The foregoing contract and bond have been this day confirmed by the board of aldermen of the city of Westport.

Attest: G. L. LOVE, *City Clerk.*

Guarantee.

Party of the first part expressly agrees to construct the said pa
ment with such material and in such manner that the same sh
endure without the need of any repairs for a period of — years fr
and after the completion and acceptance thereof.

It is expressly agreed that the city engineer shall be the sole a
final arbitrator to determine at any and all times within said
riod of — years whether or not said pavement conforms to t
aforesaid guarantee, and that when said engineer shall determi
that any faults, defect or imperfection exists in said pavement d
ing the period aforesaid, and he shall give the party of the fi
part or his agents notice thereof in writing, if the said party of t
first part shall fail to make good such fault, defects or imperfecti
within ten (10) days after the receipt of such notice aforesaid, th
this guarantee shall be held to have been broken and said party
the first part shall be liable to pay to city of Westport the cost
making good such fault, defect or imperfection.

When any repairs or construction of gas or water mains, or ser
ice of any sewer or connection may be necessary in said street d
ing the life of this contract, and such construction, connection
repairs requires the tearing up of said pavement, said party of t
first part shall excavate and refill all trenches that may be require
and shall replace and repair the pavement. Such trenching a
refilling shall be paid for upon the actual cost to said parties
doing such work, and such repairing shall be paid for at the pri
herein named for the first cost of the work of paving such stre
the payment for all of which shall be made by the city of Westpo

Know all men by these presents: That we, The Barber Aspha
Paving Company as principal and Hugh McGowan and W. C. Gla
as securities, are firmly held and bound to Kansas City, Missouri,
the sum of eight thousand ($8,000) dollars, lawful money, for t
payment of which well and truly to be made we hereby bind ou
selves, our heirs, executors and administrators firmly by these pre
ents.

221 The conditions of the above obligations are as follows:

Whereas, the Barber Asphalt Paving Co. have guarantee
under contract with the city of Westport dated Sept. 11th, 189
that the asphalt pavement on Wyandotte street from the south li
of Hunter avenue to the north line of Westport avenue for the co
sideration and under the conditions mentioned in said contract,
provided by ordinance No. 1931, approved Sept. 3d, 1897, shall
constructed with such materials and in such manner that the sam
shall endure without the need of any repairs for a period of 5 yea
from and after the completion and acceptance of the same.

Now, therefore, if the said pavement shall endure without th
need of any repairs for a period of five years from and after th

completion and acceptance, then this obligation shall be void, otherwise to be in full force and effect.

In testimony whereof we have hereunto set our hands and seals this — day of —— 1897.

THE BARBER ASPHALT PAVING CO.,
By HENRY R. KASSON,
Attorney in Fact. [SEAL.]
HUGH J. McGOWAN. [SEAL.]
W. C. GLASS. [SEAL.]

City attorney's office.

THE CITY OF WESTPORT, MO., *Sept.* 22, 1897.

The foregoing bond is in due form according to law and is hereby approved.

A. S. MARLEY,
City Attorney.

Mayor's office.

CITY OF WESTPORT, MO., *Sept.* 22, 1897.

The foregoing bond is hereby approved this 9th day of Oct. 1897.

D. D. DRAKE, *Mayor.*

(Indorsement on back:) Contract Westport with the Barber Asphalt Paving Co., for constructing asphalt pavement on Wyandotte street from Hunter avenue to Westport avenue. Executed Sept. 22, 1897. Confirmed by ordinance of common council No. 1949.

No. 1949.

An ordinance to confirm contract to pave Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue.

Be it ordained by the board of aldermen of the city of Westport, as follows:

SECTION I. That the contract dated September 11, 1897, between The Barber Asphalt Paving Company, as principal, party of the first part and Hugh J. McGowan and W. C. Glass, as securities, parties of the second part, and the City of Westport, party of the third part, for making the following city improvements, viz:

Constructing an asphalt pavement on Wyandotte street from the south line of Hunter avenue to the north line of Westport
222 avenue, under the provisions of ordinance No. 1931, entitled "An ordinance to pave Wyandotte street, from the south line of Hunter avenue to the north line of Westport avenue," approved Sept. 3d, 1897, be and the same is hereby confirmed.

SECTION II. The board of aldermen find and declare that the city engineer has made an estimate of the cost of the work mentioned and described in the contract referred to in the first section of this ordinance and heretofore submitted the same to the board of alder-

men and that bids for the doing of said work have been duly advertised for according to law, and that the Barber Asphalt Paving Company is the lowest and best bidder for the work required to be done by the terms of the contract and ordinance aforesaid, and the contract for such work has been duly awarded to said Barber Asphalt Paving Company.

Approved Sept. 22nd, 1897.

D. D. DRAKE,
Mayor and ex-Officio President of the Board of Aldermen.

Attest: G. L. LOVE, *City Clerk.*

WESTPORT, MO., *Nov. 15th*, 1897.

To the honorable mayor and board of aldermen of the city of Westport.

GENTLEMEN: The work of paving Wyandotte street from Hunter avenue to Westport avenue, under ordinance No. 1931, approved September 3rd, 1897, has been completed and accepted by me as city engineer, and I have apportioned the cost thereof against the land fronting on the street, according to the frontage, as follows:

Description of property.	Owners.	Front feet.	Amount.
All of W. ½ of S. W. ¼, sec. 17, T. 49, R. 33, lying S. and E. of Grand blvd. N. of center line of Continental St., W. of center line of Wyandotte street.	Redemptorist Fathers.	735.98	$2382.98
Lot 17 block 1 Hyde Park	C. F. Morse *et al*	54.42	175.20
" 18 " 1 "	"	50	167.10
" 19 " 1 "	"	50	167.10
" 20 " 1 "	"	50	167.10
" 21 " 1 "	"	50	167.10
" 22 " 1 "	"	50	167.10
" 23 " 1 "	"	50	167.10
" 24 " 1 "	"	50	167.10
" 25 " 1 "	"	50	167.10
" 26 " 1 "	"	50	167.10
" 27 " 1 "	"	50	162.10
" 28 " 1 "	"	50	167.10
" 29 " 1 "	R. H. Keith	50	167.10
" 30 " 1 "	"	50	167.10
" 31 " 1 "	"	50	167.10
" 12 " 4 "	"	28.71	79.24
" 13 " 4 "	C. F. Morse	57.79	215.50
" 14 " 4 "	"	50	186.45
" 15 " 4 "	"	50	186.45
" 17 " 4 "	"	50	186.45
" 18 " 4 "	"	50	186.45
" 19 " 4 "	"	50	186.45
" 20 " 4 "	"	50	186.45
" 21 " 4 "	"	50	186.45
" 22 " 4 "	"	57.37	213.93
" 1 " 5 "	"	57.37	213.64

Description of property.	Owners.	Front feet.	Amount.
223			
Lot 2 block 5 Hyde Park	C. F. Morse	50	186.20
" 3 " 5 "	"	50	186.20
" 4 " 5 "	"	50	186.20
" 5 " 5 "	"	50	186.20
" 6 " 5 "	"	50	186.20
" 7 " 5 "	"	50	186.20
" 8 " 5 "	"	50	136.20
" 9 " 5 "	"	50	186.20
" 10 " 5 (N. 40 f.)	Hugh C. Ward rec	40	149.00
" 10 " 5 (S. 10 f.)	Susan N. Jones	10	37.20
" 11 " 5 "	"	57.79	215.21
" 1 " 8 "	C. Ward rec	66.33	248.75
" 2 " 8 "	"	50	187.50
" 3 " 8 "	"	50	187.50
" 4 " 8 "	"	50	187.50
" 5 " 8 "	"	50	187.50
" 6 " 8 "	"	50	187.50
" 7 " 8 "	"	50	187.50
" 8 " 8 "	"	50	187.50
" 8 " 8 "	"	50	187.50
" 9 " 8 "	"	50	187.50
" 10 " 8 "	"	50	187.50
" 11 " 8 "	"	66.38	248.93
" 12 " 9 "	"	66.29	248.58
" 13 " 9 "	"	50	187.50
" 14 " 9 "	"	50	187.50
" 15 " 9 "	"	50	187.50
" 16 " 9 "	"	50	187.50
" 17 " 9 "	"	50	187.50
" 18 " 9 "	"	50	187.50
" 19 " 9 "	"	50	187.50
" 20 " 9 "	"	50	187.50
" 21 " 9 "	"	50	187.50
" 22 " 9 "	"	66.29	248.58
" 19 " 29 "	Mary L. Hill *et al*	41.20	151.32
" 20 " 29 "	"	50	183.65
" 21 " 29 "	Mary D. B. Caldwell	50	183.65
" 22 " 29 "	"	50	183.65
" 23 " 29 "	Walter C. Bacon	50	183.65
" 24 " 29 "	"	50	183.65
" 7 " 2 Hyde Park annex	C. M. Karges	53.4	196.12
" 8 " 2 "	"	50	183.65
" 9 " 2 "	"	50	183.65
" 10 " 2 "	Caroline B. Cheever	50	183.65
" 11 " 2 "	Jane R. Gillette	50	182.65
" 12 " 2	John C. Schmedinghoff	50	183.65
" 1 Hanover place	Lewis W. Lear	41.3	147.44
" 2 (n. 10 f.) "	"	10	35.70
" 2 (s. 40 f.) "	Chas. W. Peters	40	142.80
" 3 "	Olive Bracken	50	178.50
" 4 "	V. K. Sammons	50	178.50
" 5 "	Harry C. Lindsley	50	178.50
" 6 "	"	50	178.50
W. ½ of W. ½ lot 5, John Harris subdivision.	T. H. Swope	328	1170.98
Lot 1 block 23 Hyde Park	Kate Pierce	48.82	172.48
" 2 " 23 "	A. S. Pierce	50	176.64
" 3 " 23 "	W. N. Sweeney	50	176.64
" 4 " 23 "	A. S. Pierce	50	176.64

Description of property.	Owners.	Front feet.	Amount.
Lot 5 block 23 Hyde Park	A. J. McDonald.. ...	50	176.64
" 6 " 23 "	John H. Miller	50	176.64
" 7 " 23 "	John E. Cole	50	176.64
" 8 " 23 "	"	50	176.54
" 9 " 23 "	"	50	176.64
" 10 " 23 "	"	50	176.64
" 11 " 23 "	Western Inv. Co.....	50	176.64
" 12 " 23 "	"	48.82	172.48
1 Arnold's resurvey T. G. Cross add.	Laura A. Lee.....	48.82	168.62
2 "	"	50	172.68
3 "	"	50	172.68
4 "	Thomas Weston.....	50	172.68
5 "	"	50	172.68
6 "	Leora Penfield.....	60	189.95
224			
Lot 6 block 46 Hyde Park	D. Merriwether.....	55.38	186.85
" 7 " 46 "	"	50	168.70
" 8 " 46 "	"	50	168.70
" 9 " 46 "	"	50	168.70
" 10 " 46 "	"	50	168.70
N. 100 f. lt. 7 sub. J. Harris est..	J. Harris	100	324.00
N. 50 f. of s. 103 f. of n. 232.5 f. " ..	Geo. W. Phaler.....	50	162.00
S. 82.5 f. of n. 232.5 f. " ..	C. W. Fuller *et al*....	82.5	167.30
Lot 1 Hornbeck & Eltings alm't..	Wm. A. Rule.....	50	162.00
" 2 (n. 25 f.) " ..	"	25	81.00
" 2 (s. 25 f.) " ..	John E. Caps *et al*....	25	81.00
" 3 " ..	W. F. Asbury.....	50	162.00
" 4 " ..	Russell A. Alger	50	162.00
" 5 " ..	"	50	162.00
" 6 " ..	R. S. Darlington.....	50	162.00
" 7 " ..	Rob't B. Cone.....	50	162.00
" 8 " ..	Wm. M. Hall.... ..	50	162.00
" 9 " ..	Henry L. Kraft.....	50	162.00
" 10 (n. 25 f.) " ..	Lillian A. Reiger.....	25	81.00
" 10 (s. 25 f.) " ..	W. D. Parks.....	25	82.00
" 11 " ..	Martin Hackler.....	44.77	145.05
" 12 " ..	Henry Z. McLain ...	50	162.00
" 13 " ..	W. B. Upton	50	136.92
" 13 block 48 Hyde Park	Hugh C. Ward rec...	48.78	174.97
" 14 " 48 "	" ...	50	179.35
" 15 " 48 "	" ...	50	179.35
" 16 " 48 "	" ...	50	179.35
" 17 " 48 "	" ...	50	179.35
" 18 " 48 "	" ...	50	179.35
" 19 " 48 "	" ...	50	179.35
" 20 " 48 "	" ..	50	179.35
" 21 " 48 "	" ...	50	179.35
" 22 " 48 "	" ...	50	179.35
" 23 " 48 "	" ...	50	179.35
" 24 " 48 "	" ...	53.78	192.90
" 1 " 49 "	R. H. Field.....	98.78	358.08
" 5 " 40 "	John C. Sherwood ...	50	181.25
" 6 " 40 "	The City Tr. Co	50	181.25
" 7 " 40 "	"	50	181.25
" 8 " 40 "	"	60	217.50
" 1 " 41 "	Ella B. Adams.	58.82	203.16
" 2 " 41 "	"	50	172.68
" 3 " 41 "	R. H. Field	50	172.68

Description of property.	Owners.	Front feet.	Amount.
Lot 4 block 41 Hyde Park	R. H. Field	50	172.68
" 5 " 41 "	Emma B. Evens	50	172.68
" 6 " 41 "	Carrie H. Patterson	50	172.68
" 7 " 43 "	D. Merriwether	48.78	176.83
" 8 " 43 "	"	50	181.25
" 9 " 43 "	Henrietta Green	50	181.25
" 10 " 43 "	Nina L. Hockstetler	50	181.25
" 11 " 43 "	"	50	181.25
" 12 " 43 "	"	50	181.25
" 7 " 2 Cor. plat of amended plat of Mendell's Murray Hill.	W. A. Wilson	160	539.80
" 8 " 2 "	"	89	300.29
" 9 " 2 "	"	75	253.05
" 10 " 2 "	"	75	253.05
" 11 " 2(s. 50 f.) "	"	50	168.70
" 11 " 2(n. 25 f.) "	"	25	84.35
" 12 " 2 "	"	75	253.05
		9063.67 ft.	$31908.54

Respectfully submitted,
(Signed) H. B. ABERCROMBIE,
City Engineer.

225 No. 2047.

An ordinance levying a special assessment and for the issue of tax bills for paving Wyandotte street from Hunter avenue to Westport avenue.

Be it ordained by the board of aldermen of the city of Westport, as follows:

SEC. 1. That the report of the city engineer to the effect that the work of paving Wyandotte street from Hunter avenue to Westport avenue, has been completed and by him accepted and the cost thereof apportioned as stated in said report, is hereby received, ordered filed and approved, and said report shall be by the city clerk attached to this ordinance and is hereby expressly referred to and made a part hereof.

SEC. 2. A special assessment is hereby levied and made against the respective lots and tracts of land described in said report for the respective amounts named therein, and the city engineer is hereby ordered to make out and certify special tax bills for said special assessment against said lots and for the amount stated in said report; said tax bills to be issued in favor of the Barber Asphalt Paving Company, the contractor with the city for doing the said work. And said tax bills shall be issued and executed according to law, and shall bear interest at the rate of eight per cent. per annum until paid.

In cases where the owners have notified the city clerk, as required

by law, that they desire said bills to be issued in installments, the same shall be so issued by the city engineer according to law, and said installment bills shall bear interest from the date of issue at the rate of six per cent.

SEC. 3. Said tax bills shall be registered by the city clerk in his office, and shall by him be delivered to the parties in whose favor issued, and he shall take the receipt of such party or parties in full for all claims against the city on account of said work.

SEC. 4. Any owner or person interested in any of the lots or parcels of land against which said tax bills are issued may pay the amount of any such tax bill together with accrued interest thereon to the date of payment to the city clerk, and the city clerk shall cancel the record of the same in his office, and the lot or tract of land described in said tax bill so paid shall then stand released and free of the lien of such tax bill, and the clerk shall pay the amount so collected on such tax bill to the owner or holder thereof upon presentation of such bill, and shall then cancel said bill and file and keep the same as a part of the records of the office.

Approved Nov. 18th. 1897.

D. D. DRAKE,
Mayor and ex-Officio President of the Board of Aldermen.

Attest: G. L. LOVE, *City Clerk.*

226 By Mr. FIELD:

Q. I will ask you if these three streets, Main, Baltimore avenue and Wyandotte, run parallel with each other?

A. Yes sir.

Q. I will ask you how far they are apart.

A. One block between each street,—one block between Main and Baltimore and one block between Baltimore and Wyandotte.

Q. Well Baltimore avenue is between Wyandotte and Main street and there is no other intervening street?

A. No sir.

Q. Now what is the distance from Main street,—look on this map,—to Baltimore avenue?

A. Well according to this plat it is 280 feet and I would say that was close to it.

Q. 280 feet?

A. Yes sir.

Q. From Main to Baltimore avenue?

A. Yes sir.

Q. What is the distance from Baltimore avenue to Wyandotte street?

A. Well it is in that neighborhood, the same distance or perhaps a little less.

Q. About 260 feet?

A. Possibly.

Q. So that we have three street pavements here parallel to each other within 550 feet, have we or have we not?

A. Yes sir.
Q. Running parallel to each other?
A. Yes sir, we have I will say inside of 600 feet.
Q. Well exclusive of the street isn't it within 540 feet?
A. Well according to this plat.
Q. That is the last printed map here of the city isn't it?
A. Yes sir, I think so,—I have found some errors.
Q. So we have three parallel streets within you say a maximum of six hundred feet along in front of a large majority of property then vacant and unimproved?
A. Yes sir, the majority of the property along those streets was vacant and unimproved.
Q. Then and now vacant and unimproved counting all the building since?
A. Well, probably, yes.
Q. How long are those pavements? I believe you said
227 about a mile long, each of those streets?
A. Very close to it.
Q. And about three miles from the business center of Kansas City?
A. Take the south end.
Q. Take the north end.
A. Well it would be two miles.
Q. There is a mile and a half of residence and business property intervening between the business portion and 33d street?
A. Well you might call it residence property,—some of it is rather rough.
Q. Well it is all a great deal more thickly settled territory than this is?
A. Well no, not all of it, when you get south of 23d street.

Re-cross-examination by Mr. SCARRITT:

Q. The business part of the city runs from the river on the north to about 22nd street?
A. To 20th or 22nd.
Q. The streets that are numbered from "1" to "40" or "50" consecutively run in an east and west direction, don't they?
A. Yes sir.
Q. Now along about 20th or 22nd there is a creek running in an east and west direction, is there not, commonly called O. K. creek?
A. That is about its location.
Q. The level of that creek is pretty nearly that of the river level, isn't it?
A. I think it is,—I am not sure on that point.
Q. And south of this creek and south of 22d street the ground rises very abruptly for something like a mile?
A. Yes, it is pretty rough ground over to Summit street.
Q. Well it rises to an elevation about a mile and a half south of O. K. creek of about 250 feet above O. K. Creek level?

A. Well I should judge that is not far from it but I do not know how far.

Q. Now this ground intervening from 20th street is very rough and rugged, isn't it?

A. Yes sir.

Q. Intersected by deep ravines and draws?

A. Yes sir.

228 Q. So that there is very little desirable residence property in that section?

A. Only a narrow strip.

Q. Now when you get south of 29th street the ground flattens out in a high plateau?

A. Well west of Main street you do not get to it at 29th street, it is rough to 33d.

Q. And south of 33rd it is high rolling ground?

A. Yes sir.

Q. Now isn't the main travelled thoroughfare between Westport and Kansas City called Grand avenue in Kansas City and Main street in Westport?

A. Yes sir,—well I think they have changed the name of it again to Main street on this side. That is the way of it. It was Grand avenue up to Westport and then it was Main street.

Q. That is a broad thoroughfare 100 feet wide, isn't it?

A. Well I do not know exactly. It was ninety something I think.

By Mr. FIELD:

Q. You testified it was about eighty feet in front of my property.

A. Yes sir. That is the width south of 33rd St.

By Mr. SCARRITT:

Q. And it is paved with asphalt from Ninth street in Kansas City out to Westport avenue which is the central east and west street of Westport, isn't it?

A. Yes sir.

Q. And the traffic between the old town of Westport and Kansas City is principally along that thoroughfare?

A. Pretty nearly altogether.

Q. Now when you get to this high plateau land south of 33d street the streets are platted regularly and improved, are they not, as residence property?

A. Yes, on the west of Main.

Q. Isn't it a fact, Doctor, that the streets west of Main street in Kansas City taking them in their order, Baltimore avenue, Wyandotte street, Central street and May street, Broadway, are interrupted in this rough section of ground between 20th and 29th or 30th streets, and are not put through and improved as traveled

229 thoroughfares?

A. Well Wyandotte street has an outlet through. It is in the Penn Valley Park district now down that ravine.

Q. Is it not improved, is it, this thoroughfare?
A. It is a fairly good street.
Q. Is there any pavement on it?
A. No, it is a dirt street.

By Mr. FIELD:

Q. You mean north of this 33rd street?
A. North of 33rd street, yes sir.

By Mr. SCARRITT:

Q. The others do not even run through?
A. No sir, and this Wyandotte street makes an angle off into Broadway and Penn before it gets down into the city?
Q. It is a fact that none of them run straight through, isn't it?
A. None of them run straight through.
Q. Not even Wyandotte street?
A. No sir, you could not get through on Wyandotte street on a line.
Q. You speak of 33rd street, isn't that a section of the old Grand boulevard, as it was called?
A. Yes sir, it ran from Main to Broadway.
Q. That is an off-shoot from Grand avenue connecting up with these streets west of Main out there, Baltimore, Wyandotte and Central?
A. Yes sir.
Q. That is paved with asphalt?
A. Up to Wyandotte.
Q. It is a wide thoroughfare?
A. Yes sir.
Q. Very handsome and improved?

Counsel for the complainant objects to the question as immaterial.

A. Yes sir.
Q. Now out west of these streets, Baltimore and Wyandotte, the improvements have been made and it is thickly built up and
230 it is a populous district?

Counsel for complainant objects to testimony in regard to anything west of Baltimore and Wyandotte as immaterial.

A. Well Broadway has some fine residences and Penn street and over in Mellier district are some very fine residences.
Q. Roanoke,—that is a very handsome modern district?
A. Yes, it is the prettiest district around the city I think.

By Mr. FIELD:

Q. Three-quarters of a mile west of my property?
A. Yes sir.

By Mr. SCARRITT:

Q. Every street in that addition is paved with asphalt and gran-

itoid sidewalks and granitoid curb, has sewers and water works and everything is in in Roanoke?

A. I think everything in the south end of the addition is, that is up to 36th street. I do not think 36th street is paved.

Q. What is the street on which George W. Jones and John Perry and others of these capitalists have built?

A. Broadway.

Q. That is still west of Baltimore avenue and Wyandotte.

Counsel for complainant objects to question as immaterial.

A. Yes sir.

Q. Those are some of the very handsome residences of Kansas City?

A. Some of them.

Q. In coming from Broadway and the very fine residence district you have referred to do not these residents have to come across Wyandotte street and Baltimore avenue and Main street to Kansas City in their handsome equipages and conveyances?

Complainant objects to the question as immaterial.

A. Well from Broadway the general course into the city is
231 over Main street.

Q. And these residents have to cross Baltimore and Wyandotte to get to Main, do they not?

A. If they go directly to Main, yes.

Q. You spoke of Charles E. Finley and other capitalists?——

By Mr. FIELD: *Q.* I object to Charles E. Finley as a capitalist or desirable man.

By Mr. SCARRITT:

Q. He built a number of houses on Warwick boulevard, one of the bon ton streets of Westport, did he not?

By Mr. FIELD: I am going to ask the court to tax the costs of this examination, no matter what the result of this case may be, against the defendants.

A. I think Finley built one or two, two or three perhaps, houses over there, I don't know.

Q. He lives on that street, doesn't he?

A. Yes sir.

By Mr. FIELD: I object to that as immaterial,—I think it would be best for the town if he did not live in it.

By Mr. SCARRITT:

Q. Now out in the neighborhood where Col. Nelson the owner of the Star, and A. R. Meyer, and other leading citizens reside?

Counsel for the complainant objects to this examination as immaterial, irrelevant. It is an imposition and an effort to steal from me.

By Mr. SCARRITT:

Q. Now Westport, Doctor, at one time was really in advance of Kansas City in business enterprise, was it not?

Complainant makes same objection as made last above.

A. I have not been here long enough to answer that question.

Q. Well you take Westport avenue, it is now and always
232 has been a business district, has it not?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Part of it is.

Q. Your city hall and public library and your leading bank and leading mercantile establishments are located on that street, are they not?

A. The city hall is not,—it is one block off.

Q. The city offices are located on that street?

A. They were until the new hall was built.

Q. And that section is immediately south of Judge Field's property referred to in this examination?

A. No, it is more west than south.

Complainant moves to strike out the examination of defendant as incompetent, irrelevant and immaterial and complainant asks the court to tax the costs of the same against the defendant. I have been powerless and have had to submit, to this imposition.

Redirect-examination by Mr. FIELD:

Q. Doctor, north of 39th street was not within the city limits of Westport even until what year?

A. That is a long time Judge.

Q. When was that city extension?

A. About half way up 39th street was the old city limits.

Q. Thirty-ninth was the old city limits?

A. About 180 feet or 200 feet north of 39th.

Q. So that property north of 200 feet north of 39th street was not within the city limits at all until a few years ago?

A. Not until 1891.

Q. And prior to 1891 was not within the city limits?

A. No sir.

Q. During this whole time he has been talking to you about the city hall and business houses and other foolishness and about other streets and you have gone into other property here that is
233 three quarters of a mile west of any property on Wyandotte street,——

A. Some of it is more than that.

Q. And he has asked you about property that is half a mile from 39th street south and west?

A. Yes west.

Q. Take Nelson's property and Meyer's property, that is more than half a mile from there?

A. Where Finley lives is not half a mile.

Q. I do not care anything about Finley, he is too little to notice. He is the kind of people that naturally the Barber Asphalt Company would fall in with. I do not care to discuss him at all. I will ask you if this property Mr. Scarritt has inquired of you about as to pavements and improvements is not upon an average from half to ¾ of a mile west of my property.

A. Perhaps it is, yes sir.

Q. Now cross streets, how many of them are there between 33rd and the north line of Westport avenue?

A. There are six cross streets in there I think.

Q. The cable line runs out on Main street, the main thoroughfare from Kansas City?

A. Yes sir.

G. L. LOVE.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this 5th day of April, 1900.

ALFRED FIDLER,

[SEAL.] *Notary Public, Jackson County, Missouri.*

Not being able to complete the taking of these depositions on this day, by and with the consent of the parties complainant and defendant to this action I adjourn the further taking of these depositions until to-morrow the taking thereof then to be resumed at the same place and within the same hours mentioned in the annexed notice.

Given under my hand and notarial seal this 23d day of March, 1900.

ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

Pursuant to adjournment as above stated, on this the 24th day of March, 1900, between the same hours mentioned in the caption hereof and at the same place, counsel for complainant and defendant being present, I resumed the taking of said depositions as follows:

234 R. H. FIELD, of lawful age, being produced, sworn and examined in his own behalf deposeth and saith as follows:

Direct-examination, by Mr. WASH ADAMS:

Q. You are the complainant in this case?

A. I am.

Q. Did you reside in Westport, Missouri, in 1897, or any other time?

A. No sir.

Q. Where did you reside throughout the year 1897 and where have you resided since then?

A. I resided 1106 Tracy avenue, Kansas City, Missouri. I have resided there ever since that date and for seventeen years before then.

Q. Are the three streets Main street, Baltimore avenue and Main street parallel to each other or do they run in different directions?

A. They are parallel to each other and do not run in different directions.

Q. Are they divided by other streets?

A. There is no other street between them.

Q. How far apart from each other are they?

A. Main street is the eastern street. They run north and south all of them. Baltimore avenue is 280 feet west of Main street. Wyandotte street is 260 feet west of Baltimore avenue.

Q. How many blocks in length were these several street pavements and what was the length in each block?

A. On Main street from Springfield avenue which is the same as 31st street, to Westport avenue, there were nine blocks. On Baltimore avenue from 33d which is the north line of the street pavement in question, to Westport avenue, seven blocks. Wyandotte street from 33d street the north boundary of the pavement in question, to Westport avenue, is seven blocks. These blocks average in length from seven to nine hundred feet. I believe none of them are less than six hundred feet, except where there is a short street intervening which is not numbered but named which I have not counted in giving the number of streets,—33d street, 34th, 35th, 36th,
235 37th, 38th, 39th and Westport avenue. Those are the cross streets.

Q. Did you give the length of each block?

A. Yes.

Q. Are they six hundred feet?

A. Some of them,—some of them are more than that.

Q. Were the lots on Main street at the points in question generally improved or generally vacant at the time of the pavement in question?

A. They were generally vacant. I have the exact number of houses. I can give the number, but I will make the answer for the present that they are generally vacant.

Q. Where on Main street were those most improved?

A. 31st street or Springfield avenue was the south boundary line of Kansas City, Missouri and north boundary line of Westport, Missouri, in December, 1897, when the limits were extended. There is a store on the corner of 31st on the east side of Main street at Springfield avenue and I think there are 10 small houses in that block around that store. That was at the time of the pavement in question the only block that was largely built up. I believe there were possibly one or two vacant lots left in that block. That was a suburban store there and cheaply built houses, frames mostly and maybe one brick, a cheap kind of houses. There wasn't much improved, not exceeding possibly seven or eight houses,—there were possibly more than that too,—about ten or twelve houses in the next

seven blocks south on either side of the street. I have the exact number I can give them on cross-examination. Down at the terminus of the street railroad at Westport avenue there is a car barn which occupies most of the block on the east side of the street and there are seven little stores there. That was at the extreme south of the Main Street pavement. The idea I mean to convey is the only part of Main street built at that time or built up now very greatly are those two blocks at the extreme ends of the pavement in question. The intervening blocks were very largely va-
236 cant and some blocks had no houses at all for 600 or possibly 900 feet and others only having one house in the block and others having two or three houses in the block and one I think had six or seven houses in the block. It is very largely vacant and unimproved property.

Q. Was Baltimore avenue then more or less improved than Main street?

A. Less I think, that is in the way of houses.

Q. What part of the street had most of the houses on Baltimore avenue between the points in question?

A. Between Westport avenue and 39th street, the south block of that street pavement. That is a part of the old town of Westport. The property north of 39th street on Baltimore avenue with the possible exception of a hundred or so feet, 180 feet maybe, not over 200 feet, at the outside, was not within the limits of Westport before 1891. Before 1891 all the property up to 33d street, in fact up to Springfield avenue, was not within the corporate limits of Kansas City or Westport or any other city. It was known as Hyde Park since it was platted in 1887.

Q. What part of Baltimore avenue at the time these pavements were laid then had sidewalks?

A. There was a sidewalk I think on both sides of Baltimore avenue from Westport avenue to 39th street. That was in the old town of Westport, and I think a sidewalk on the west side of Baltimore avenue from 39th to 38th street.

Q. On the east side of Baltimore avenue between 39th and 38th there was no sidewalk and is none now. North of 38th street to 33d street, the north boundary of the pavement in question, I do not believe there was any kind of a sidewalk at the time of the paving in question of Baltimore avenue. There might possibly have been some corner lot which had a house facing on some other street that had a sidewalk, but it is my recollection that there was no sidewalk on Baltimore avenue along the side of the pavement in question for five blocks. Baltimore avenue was at first a dirt road. Balti-
237 more avenue north of 39th street had very few houses. I might have had a half a dozen houses but my recollection is I did not have that many for six blocks north of 39th street. I can give the exact number it now has if they wish it on cross examination. I have been over the ground recently and know the number of houses in each block on each street.

Q. How was the street on Wyandotte street when this pavement was laid, mostly vacant or mostly improved?

A. Well it was mostly vacant. It had but few more houses than Baltimore avenue and it was mostly vacant and unimproved.

Q. How many houses on Main street on the pavement in question do you think are an advantage to the other property on the street?

Counsel for defendant objects to the question as incompetent, immaterial and irrelevant.

A. I think Mr. Mastin's house at the corner of 35th and Main street, three blocks north of 38th, Judge Ellison's house at 38th and Main street, a house north of his, I don't know whose it is, also a house right opposite Judge Ellison's put up recently. Major Warner has a large frame house formerly belonging to Major Jones. It is a large frame house and it has been there for ten years probably or more, and then there are two or three houses recently built by Mr. Slavens between 31st and 33d on the west side that are pretty fair houses, these I think are such as would give some cast to the street. The other houses are not of any benefit to the property but rather a detriment, if any.

Q. Did you mention Mr. Taylor's house?

A. I forgot Mr. Taylor's house, a very fine house opposite Mr. Mastin's on 35th and Main. I add Mr. Taylor's house to those that I have named. There are no others that I remember.

Q. When was Wyandotte Street macadamizing done along
238 your property?

A. It was in 1893 I think. My recollection is it was in the summer of 1893.

Q. Was the macadam worn out or in need of repairs on Wyandotte street when the pavement was laid by defendant?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial for the reason that the judgment of the municipal authorities of Westport and the expressed judgment of the majority of the property owners on that question is conclusive.

I think not.

A. I was out there rather frequently and looked at that property. I go out there often enough to be able to say that as a macadam street it was about as good as macadam streets usually are, in front of my property. In fact in front of my property and for several blocks either way. I never went over the whole street. There may have been some places along the street not in proper repair but my testimony refers to my property near the corner of 38th. I have no property on any of these streets north of 38th. All my property lies between 38th street and Westport avenue on these three streets.

Q. Was the cost for the macadamizing of Wyandotte street in 1893 assessed in tax bills against your property?

A. It was.

Q. What sidewalks were on Wyandotte street between the points in question at the time the defendant laid asphalt on the street?

A. I do not know definitely as to that. I know this much, that now there are no sidewalks on Wyandotte street neither plank or stone or any pretense of a sidewalk north of 36th street for three blocks north to 33rd on either side of the street. It looks like a common out there excepting the asphalt pavement.

Q. Is any part of Wyandotte street along the pavement in question yet without sidewalks?

A. I have just answered that.

Q. Was Main street macadamized by the city of Westport
239 and the cost of the same assessed against your property?

A. Part of it. The cost of the macadamizing of Main street from 39th to Westport avenue, block 45 Hyde Park, or lots in 45 fronting on Main street, were assessed for that macadam.

Q. What is the particular description of your part of this property?

A. I have just given it, block 45 Hyde Park.

Q. What was the condition of the macadam in this street by block 45 Hyde Park when the asphalt pavement was laid thereon?

Counsel for the defendant objects to the question as incompetent, irrelevant and immaterial for the reason that the judgment of the municipal authorities of Westport and the majority of resident property owners along the street is conclusive.

A. When I learned that this Main street was going to be paved or about to be paved I went out on the car to this block 45 Hyde Park and I noticed the macadam fronting on this lot 45. It had been swept preparatory to laying this asphalt pavement, and if there is such a thing as a good macadam street why that street would seem to be all that you could expect or ask of the macadam. I mean the one on Main street in front of lots in block 45 about which I have just testified. It seemed to be in no need whatever of additional pavement except it be a matter of taste to get asphalt instead of having the surface stone. I know that the depth of that macadam was eleven or 12 inches, my recollection is 11 inches, Dr. Love said 12, because I examined it after it was down. I had some suspicion about the contractor and I examined it before I settled the tax bills and I found that it came up to the specifications.

Q. Have you had any talk with the agent of the defendant on the subject of compromising all the tax bills in this case, in controversy in this case?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial.

240 Q. I have had continuous talks on the subject of settling these tax bills. When I first learned they were going to pave Main street and the contract had been actually let I met Mr. McGowan and I told him that I thought it was an outrage that I should be put to the expense of paving this block 45 again,——

Counsel for defendant moves to strike out the witness' personal observations as immaterial.

A. —and I said to him I did not think it was exactly right for me to have to bear a fresh burden, and there was some talk that we could arrange the matter and I had it in my mind to bring an injunction suit at that time but the idea was given to me it would be arranged to my satisfaction so it went on. I did not know exactly when the work was done on Baltimore avenue and Wyandotte street, it lies from three to four miles from where I live. It was done very quickly, but I had information it would be done or had been done, and I went out and saw it was done very shortly before Kansas City extended its limits and took in Westport and I discovered some facts about the matter that I called to the attention of the attorneys for the Barber Asphalt Paving Company and of Mr. McGowan, and I insisted that these tax bills were void and that they could not collect them but I was willing to pay something and they told me to let the matter rest we could make a compromise, and we kept on until a few days before I filed this bill,—we had in fact orally agreed and I fully expected that the matter would be arranged in some equitable manner. I was, however, notified a day or two before I filed this bill that the proposition would be rejected and there would be no settlement and since I have filed this bill they have sued me in the State courts on all of these tax bills.

Q. State or read what evidence you have, if any, showing that you own an undivided half of lots one, two, three, four, five, eight, nine and ten, block 45 of Hyde Park, before and since the

241 filing of your bill in this case.

Counsel for defendant objects to the question as calling for secondary evidence and the opinion of the witness.

A. Well I will read in evidence the deed dated 14th day of July, 1886, from Sarah P. Anderson to Annie Camp Field, recorded on the same day in the office of the recorder of deeds of this county in Book B 168 at page 523.

This indenture, made on the 14th day of July, A. D. one thousand eight hundred and eighty six by and between Mrs. Sarah P. Anderson (single & unmarried) of Kansas City, Missouri, party of the first part, and Annie Camp Field of the county of Jackson in the State of Missouri party of the second part:

Witnesseth, that the said party of the first part, in consideration of the sum of ten thousand / 100 dollars to her paid by the said party of the second part, the receipt of which is hereby acknowledged, does by these presents grant, bargain and sell, convey and confirm, unto the said party of the second part, her heirs and assigns, the following described lots, tracts or parcels of land, lying, being and situate in the county of Jackson and State of Missouri, to wit:

The east half (½) of lot six (6) of the subdivision of the John Harris estate, being part of the south west quarter (¼) of section twenty (20), township forty-nine (49) range thirty-three (33).

To have and to hold the premises aforesaid, with all and singular the rights, privileges, appurtenances and immunities thereto belonging or in any wise appertaining unto the said party of the second

part, and unto her heirs and assigns, forever; the said Sarah P. Anderson hereby covenanting that she is lawfully seized of an indefeasible estate in fee in the premises herein conveyed; that she has good right to convey the same, that the said premises are free and clear of any incumbrance done or suffered by her or those under whom she claims, and that she will warrant and defend the title to the said premises unto the said party of the second part, and unto her heirs and assigns forever, against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said party of the first part has hereunto set her hand and seal the day and year first above written. Except taxes after 1886.

SARAH P. ANDERSON. [SEAL.]

Signed, sealed and delivered in presence of us,

——— ———.

——— ———.

STATE OF MISSOURI, } ss:
County of Jackson, }

On this 14″ day of July 1886 before me personally appeared Mrs. Sarah P. Anderson to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed. And the said Sarah P. Anderson further declared herself to be single and unmarried.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Kansas City, Mo. the day and year first above written. My term expires July 9″, 1888.

[NOTARIAL SEAL.] J. B. HAMNER,
Notary Public.

242 STATE OF MISSOURI, } ss:
County of Jackson, }

In the recorder's office.

I, C. D. Lucas, recorder of said county, do hereby certify that the within instrument of writing, was, at 11 o'clock and 55 minutes a. m. on the 14″ day of July, A. D. 1886, duly filed for record in my office, and is recorded in the records of this office, in Book B 168 at page 523.

In witness whereof, I have hereunto set my hand and affixed my official seal, at K. C. Mo. this 14″ day of July, 1886.

C. D. LUCAS, *Recorder,*
[SEAL.] By J. M. THATCHER, *D. R.*

Endorsed as follows:

"11759. General warranty deed, from Mrs. Sarah P. Anderson

to Annie Camp Field. Filed for record this 14th day of July, A. D. 1886, at 11 o'clock 55 minutes a. m.

CHAS. D. LUCAS, *Recorder*,
By D. W. WALLACE, *Deputy*.

Recorder's fee 75 cts. pd. J. B. M. B 168 page 623."

A. That deed was made in pursuance of a contract between me and Mrs. Sarah P. Anderson. The contract is dated June 21st, 1886, signed "Mrs. Sarah P. Anderson" and "R. H. Field." I have the contract here and it is also acknowledgd before William Allbritain, notary public. I do not care to read that (the contract) in evidence but if you want it you can do so. The purchase money of that property as shown by the deed and as the fact is was $10,000. We platted the property described in this deed in 1887 as block 45 Hyde Park, lots one to ten. Mr. Camp, my wife's father, Annie Camp Field being my wife, advanced and paid one half of the purchase price of this property and I paid the other half. It was taken in Annie Camp Field's name because it was bought as speculative property. Mr. Camp resided in Georgia and it was to enable us to handle the property here on speculation at that time, and when the depression came along we saw that we were not going to be able to dispose of all the property,—we only sold two lots. There was no demand for the property and there was no telling when it would be sold and in the meantime another piece of property had been purchased by me for Mr. Camp in Kansas City here and likewise put in Annie Camp Field's name and naturally in view of the dullness of the market and probable liability of no near future sale I thought we had probably better have some writing about the matter, so on September 18th, 1895, Annie Camp Field signed the following
243 declaration of trust as to the other lot purchased for Mr. Camp and also as to the purpose for which she held lots in block 45 Hyde Park.

By Mr. SCARRITT: I object to the witness purporting to state the contents of a written agreement and I object to that part of the evidence.

By Mr. FIELD: I simply endeavored to show the consideration and purpose of this declaration of trust which I now offer in evidence, which reads as follows:

"KANSAS CITY, MISSOURI, *September 18th*, 1895.

This writing witnesseth, that George H. Camp is the owner of the following described real estate held in my name in trust for him, to-wit, lot number one in block number six in Coates' addition to the city of Kansas, and that the said George H. Camp and Richard H. Field are the owners of the following described real estate held in my name in trust for them equally, to-wit, lots one (1), two (2), three (3), four (4), five (5), eight (8), nine (9) and ten (10), in block forty-five (45) of Hyde Park.

Witness my hand the day above stated.

ANNIE CAMP FIELD."

A. I mailed that document within a day after it was signed and delivered to me by my wife which was on the date named, to Mr. Camp and he has had the possession of it until he mailed it to me by special delivery in this envelope that I have here, on Friday of last week. There is a letter accompanying the same from his daughter who wrote for him he being a very aged man and now in a feeble condition, and that I show to the counsel. I had previously written for this document and they thought it could not be found and the only thing they could send me when I wrote for it previously was a letter that I had written July 16th, 1886, to Mr. Camp, two days after the recording of the deed from Mrs. Anderson, wherein I explained how the property was held by Annie Camp Field, which letter I now show to the gentleman and he can see what was the understanding at that time, and I also offer him all these letters which he can read. I also show him the tax receipts on this block 45, which I have since before 1890. The tax receipts before that time all seem to be taken in my name.

244 By Mr. SCARRITT: We object to all the testimony of this witness of what he offers to show counsel on the ground that it is not the best evidence of his title and we insist and notify counsel now that if he has any evidence of his interest in the land he should present it and make out his case in a legal and formal manner.

By Mr. FIELD:

A. I have alreaded shown a declaration of trust dated September 18th, 1895, more than four years before this bill was filed and the counsel now has it in his hands together with the letters I have referred to. I merely offer this testimony, not that I consider it necessary, but to show even to the counsel that the claim is no new matter. The tax receipts from 1890 down to the present date are made in the name of Camp & Field.

Counsel for the defendant makes same objection to this statement as last made above.

A. I offer this for the purpose of showing what I have said in order to show him that this is no recent matter and I allow him to inspect the tax receipts from 1890 to show who paid the taxes and show they were paid by Field & Camp or Camp & Field.

By Mr. SCARRITT: We renew our objection to the witness stating either directly or by inference the contents of written documents and we object to the testimony and ask that it be stricken out for the reason above stated and for the further reason that tax receipts are no evidence of title.

A. I have had possession of this property under wire fence which I built around it, from 1887 or 1888, down to the present date and I have had sole and exclusive charge of it.

I also offer in evidence a separate declaration of trust executed by Annie Camp Field on the 22nd day of March, 1900, ac-
245 knowledged before Alfred Fidler, notary public.

By Mr. SCARRITT: We object to it as incompetent, irrelevant and immaterial for the reason that it does purport to have even been signed long after the bill in this case was filed.

"Whereas, Richard H. Field, on the 21st day of June, 1886, purchased from Sarah P. Anderson, at and for the sum of ten thousand dollars ($10,000) the following described real estate in Jackson county, Missouri, to-wit:

The east half of lot number six (6), of the subdivision of the John Harris estate, being part of the southwest quarter (¼) of section twenty (20), township forty-nine (49), of range thirty-three (33).

Which said real estate was thereafter by deed dated July 14th, 1886, (recorded in the office of the recorder of deeds of Jackson county, Missouri, at Kansas City, on the same day in Book B, 168, at p. 523) was conveyed to the undersigned Annie Camp Field, and whereas one half of the consideration of said purchase and deed from the said Sarah P. Anderson, to wit, the sum of five thousand dollars ($5,000) was paid by the said Richard H. Field to the said Sarah P. Anderson, and whereas, it was then and has ever since been understood by and between the undersigned, and the said Richard H. Field that by said deed I took and held the title to an undivided one half of said real estate for him, and which said undivided half of said real estate I have held in trust for the said Richard H. Field since the 14th day of July, 1886, the date of the deed aforesaid, and yet so hold the same, which said real estate was on May 27th, 1887, by the undersigned and said Richard H. Field, by plat duly made and filed in the office of the recorder of deeds of said county, platted as block 45 Hyde Park, and subdivided into ten (10) lots numbered consecutively from 1 to 10 inclusive.

Now, therefore, this is to show that I have held since the 14th day of July, 1886, and that I now hold in my name for the said Richard H. Field, in the deed aforesaid, an undivided half of the real estate aforesaid, now designated as lots 1 to 10 inclusive, block forty-five (45), Hyde Park, excepting however, from this declaration of trust lots seven (7) and eight (8) in said block forty-five (45), Hyde Park, heretofore conveyed by myself and the said Richard H. Field to another party.

Witness my hand this 22nd day of March, 1900.
(Signed) ANNIE C. FIELD.

STATE OF MISSOURI, } ss:
County of Jackson, }

On this 22nd day of March, 1900, before me, Alfred Fidler, a notary public in and for said county and State, personally appeared Annie Camp Field to me known to be the person described in and

who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal at my office in Kansas City the day and year first above written. My commission expires November 14, 1902.

(Signed) ALFRED FIDLER,

[NOTARIAL SEAL.] *Notary Public, Jackson County, Missouri.*

246 By Mr. FIELD: *A* I did not consider this last declaration of trust necessary but the former was not acknowledged before a notary public and not entitled to be recorded and I have had it put in this form and I have offered it in evidence and I desire to state this, that the counsel has in his hand a letter I wrote to Mr. Camp, before referred to, July 16th, 1886, two days after getting the deed to this property, wherein I said,——

By Mr. SCARRITT: We object to the statement of the contents of any letters on the ground that the testimony is secondary and on the further ground that the letters are incompetent, irrelevant and immaterial.

By Mr. FIELD: I do not offer any of these papers as showing my interest in this property except the declarations of trust I have read. I have offered these other papers simply to satisfy the counsel that there was no suspicion whatever that I have not owned one half of the property since the date of the deed. Tax receipts are of course evidence with adverse possession. Now I have already stated everything I care to and I invite cross-examination as to the entire matter I have testified about, in the most exhaustive manner.

Cross-examination by Mr. SCARRITT:

Q. You are rather partial to asphalt pavements?

A. Well it is a good pavement.

Q. You petitioned the authorities of Kansas City to pave Tracy avenue?

A. Well I petitioned Kansas City to pave it, but I do not think it has anything to do with this case.

Q. You own a great deal of property in Kansas City?

A. I own more than I wish I did have.

247 Q. You spoke of the property not being improved?

A. I have not had anything to put on it, I can't make enough to support my family hardly.

Q. You are paying the cost of litigating these tax bills liens against it?

A. Well I do not propose to submit to anything in that way. I want to get the court's opinion on this and a fair decision in regard to these charges for this asphalt.

Q. That is a matter you pride yourself on especially, resisting tax bills?

A. I do not think that is material here. I think these tax bills are wicked and ought to be resisted.

Q. Now you referred to Main street in Westport,—that is one of the prominent thoroughfares between the two cities?

A. Yes sir, it is a continuation of Main street in Kansas City, it is the central street in the city.

Q. And from Westport it is the central street between the two towns?

A. I believe that is correct.

Q. The traffic between the two towns usually comes down this main thoroughfare?

A. Yes sir.

Q. A cable track has been down that main thoroughfare for the last ten or twelve years and it has been the best throughfare between the two cities?

A. Yes sir.

Q. And on that thoroughfare is Mr. Mastin's residence which is admitted to be one of the finest in the city?

A. Yes sir.

Q. He occupies an entire block of ground fronting on the streets in question?

A. Yes sir.

Q. Designed by New York architects?

A. I do not know. I know it is a very fine house.

Q. Mr. R. R. Conkling's residence is across the street,—he was formerly with the Jarvis-Conkling Mortgage Trust Company and is now in New York?

A. It probably did not cost more than $25.000.00. I do not
248 regard it as very fine. If I had $10.000.00 I think I could build a house very much better, give me more room and be a better looking house. That occupies 100 feet of ground I believe and is the only house in that block.

Q. He owned all the ground as appurtenant to his *h*ansion while he lived there?

A. 100 feet, yes sir.

Q. The Armours are just off this Main street to the east, Mr. Armour, G. W. Smith and Mr. Kirk Armour?

A. Mr. Armour's house and his lot are the finest in Westport or what was then called Westport. Hyde Park is the real name the property out there goes by. I think Mr. Armour has a very fine place. It is, however, nearly or quite a half a mile from any property I have and lies much prettier than any I have, and Mr. Armour does not pass by my property when he comes to town. My property is south of him and the town is north.

Q. If he goes to Westport he passes your property?

A. I do not know what he wants to go there for.

Q. The Country Club is out there?

A. I believe the Country Club is out there.

Q. You go out there very little?

A. Yes sir, my home is in Kansas City, but most of what I have is out there.

Q. Mr. Slavens is one of the prominent citizens and his is a fine house?

A. Yes sir.

Q. One of the finest in Kansas City?

A. Yes sir.

Q. Major Warner's residence is a very fine residence?

A. Yes sir.

Q. Mr. Taylor of the dry goods company has one of the handsome establishments of the city, hasn't he?

A. It is a very fine house.

Q. It is a magnificent house?

A. Yes sir, it is a fine house. I would not call it as fine as Mr. Armour's or Mr. Mastin's, but it is a very fine house, I suppose it cost twenty or twenty five thousand dollars.

249 Q. It may have cost fifty or sixty thousand for all you know?

A. Well it might have for I do not pretend to say anything about the cost of structures. I am practicing law and know very little about the cost of real estate.

Q. Judge Ellison's place, of the Kansas City court of appeals?

A. That is a new house.

Q. It is a beautiful and costly house?

A. I believe it cost twenty to twenty-two thousand dollars, I have heard, $22.500.00. It is a very fine house. Those houses you have referred to are a credit to the street. Judge Ellison's is the only one you have referred to that is near any property I have.

Q. And the Baptist church is still south on Baltimore and that is the handsomest church in Westport?

A. It is a very handsome church, but I wish it was farther away. A good many like to live near a church but I do not like to have it so near.

Q. These improvements are absolutely essential to the property?

A. I do not think they are absolutely essential. They are not necessary improvements.

Q. And Mr. Richard Keith has a fine residence?

A. I think it is on Wyandotte street.

Q. Well F. S. Groves and Mr. Wornall?

A. I would not call Mr. Groves' house a mansion nor Mr. Wornall's house.

Q. Those houses cost $15.000.00 on an average?

A. Not the Groves house, but the Wornall house probably did.

Q. And Mrs. Jones and Mr. Mastin are relatives of yours?

A. They are not relatives of mine.

Q. She has a handsome house out there?

A. She has a good house but not a handsome house. Her house is on Wyandotte street.

Q. Mr. George Lee has a handsome house out there?

A. Not a handsome house, the house cost about $7500 I should think. There are three good houses on Wyandotte, Mr.

250 Meriweather's, and George W. Lee and Mrs. Jones'. Those are brick houses and are good houses and are a credit to the street. Now over on Baltimore avenue the two Wornall houses and Mr. Keith's are good houses and those are about all the extra good houses that I know of on those two streets.

Q. Mr. Keith's place runs from Baltimore to Wyandotte?

A. Backs on Wyandotte, yes sir.

Q. And the Redemptorist Fathers have their large educational institution there on Wyandotte street?

A. Yes sir.

Q. A very valuable improvement costing many thousand dollars?

A. I do not know. It is a Catholic theological school but I do not know how much they have invested there. They have a great deal I guess. They have a block of ground I believe and have a large house upon it.

Q. That is all.

Re-direct-examination by Mr. ADAMS:

Q. Is your property in question vacant or improved?

A. It is all unimproved except the fence that is around block 45.

Complainant offers in evidence the following allegation in the petition filed in the circuit court of Jackson county, Missouri, in case number 38080 entitled "In the circuit court of Jackson county, Missouri, sitting at Kansas City, April term, 1900. The Barber Asphalt Paving Company, and Kansas City to the use of the Barber Asphalt Paving Company, plaintiffs, against Annie Camp Field, and Richard H. Field, her husband, defendants." This petition was filed January 8th, 1900, at Kansas City.

By Mr. GRIFFITH: I want to object to the introduction of this as irrelevant and immaterial.

251 By Mr. FIELD: I want to read just one clause in that petition. This is one of the suits on tax bills in question brought since the filing of the bill in this case. The following clause I read from their petition:

"Plaintiffs for first cause of action against the defendants state that the Barber Asphalt Paving Company is a corporation duly created and existing under and by virtue of the laws of the State of West Virginia and has duly complied with the laws of the State of Missouri in reference to foreign corporations doing business in the State of Missouri, and is authorized to do business in said State; that Kansas City is a municipal corporation duly created and existing under and by virtue of the laws of the State of Missouri under a provision of section 16, article 9 of the constitution of said State; that the city of Westport was on the second day of December, 1897, and for many years prior thereto had been a municipal corporation of the 4th class duly created and existing under and by virtue of the laws of the State of Missouri; that on or about the 2nd

day of December, 1897, the said city of Kansas City duly extended its corporate limits so as to include therein all of the territory included in the corporate limits of the said city of Westport; and that on the said second day of December, 1897, the corporate existence of the said city of Westport *ipso facto* ceased."

By Mr. GRIFFITH: I move to strike that out because it is irrelevant and immaterial.

R. H. FIELD.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this 5th day of April, A. D. 1900.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

The above an- foregoing being all the evidence and testimony the complainant desired to introduce complainant rests.

252 UNITED STATES OF AMERICA, } ss:
State of Missouri, County of Jackson, }

I, Alfred Fidler, a notary public within and for the county of Jackson and the State of Missouri, do certify, that in pursuance of the annexed notices, came before me at the law office of Richard H. Field, 1020 New York Life building, Kansas City, Jackson county, Missouri, J. K. Griffith, Dr. G. L. Love, John C. Tate, W. C. Scarritt, Dr. G. L. Love, recalled, and R. H. Field, who were by me severally sworn to testify the truth the whole truth and nothing but the truth touching the matter in controversy aforesaid; that they were examined and their examinations reduced to writing by myself in shorthand in the presence of the witnesses respectively, on the days, within the hours at the place in that behalf first aforesaid; that thereafter said shorthand notes were by me *sub*scribed on the typewriter as above set forth and said depositions were subscribed by said witnesses respectively in my presence at the times above certified to.

I certify that due and legal notice was given to defendant by complainant of the taking of these deposition- and counsel for defendant were present at the taking thereof; that I am not of counsel, attorney or relative of either of the parties in the caption named, nor in any way interested in the event of this cause.

I have retained the said depositions in my possession for the purpose of delivering the same, with my own hand to the court in which said cause is pending, and said depositions are now herewith returned.

Given under my hand and notarial seal this 13th day of September, A. D. 1900. My commission expires November 14th, 1902.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

Notary's fees (Orr & Fidler), $114.75.

253 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant.

Depositions.

UNITED STATES OF AMERICA,
State of Missouri, County of Jackson, } *ss:*

Depositions of witnesses produced, sworn, and examined on the 11th, 12th, 13th, 14th, 16th, and 17th days of April, 1900, and 1st day of May, 1900, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of said days, at the law office of Messrs. Scarritt, Griffith & Jones in the American Bank building, Kansas City, Jackson county, Missouri, before me, Alfred Fidler, a notary public within and for Jackson county, Missouri, in a certain cause now pending in the circuit court of the United States for the western division of the western district of Missouri, at Kansas City, between Richard H. Field, complainant, and The Barber Asphalt Paving Company, defendant, on the part of the defendant.

Appearances.

Mr. Richard H. Field, the complainant, appeared personally, and by his attorney, Mr. Charles E. Small.
Messrs. Scarritt, Griffith & Jones appeared for the defendant.

254–284 At this point it was agreed by and between counsel for the parties complainant and defendant to this action that these depositions be taken in shorthand by Alfred Fidler and *by* by him transcribed on the typewriter and when thus transcribed that they be subscribed by the respective witnesses and when thus subscribed that they be of the same force and effect as if they had been taken in longhand and subscribed by the respective witnesses immediately after the taking of the same.

And the said witnesses each one of them being of lawful age and having been by me first cautioned and sworn to tell the truth the whole truth and nothing but the truth, in the matter in controversy aforesaid, I did with the assistance of counsel, carefully examine the said witnesses and they did thereupon depose and say, respectively as follows:

* * * * * * *

285 Not being able to complete the taking of these depositions on this day by consent of parties complainant and defendant

286 to this action the further taking thereof is adjourned until to-morrow, then to be resumed at the same place and within the same hours mentioned in the annexed notice.

Given under my hand and notarial seal this 11th day of April A. D. 1900.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Mo.

Pursuant to adjournment as above stated on this the 12th day of April, 1900, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of said day, at the same place mentioned in the caption hereof, parties complainant and defendant being in attendance, I resumed the taking of these depositions as follows:

E. H. PHELPS, of lawful age, being produced, sworn and examined on the part of the defendant, deposeth and saith as follows:

Direct examination by Mr. SCARRITT:

Q. State your name, residence and business, if you please.

A. E. H. Phelps. Kansas City, Missouri. Real estate agent.

Q. How long have you been engaged in that business in this city?

Complainant objects to question as immaterial.

A. 18 years this spring.

Q. During that time and in the line of your business have you been called upon frequently to assess benefits and damages in public improvement proceedings and in condemnation proceedings in the courts of this city?

Complainant objects to the question as calling for incompetent, irrelevant and immaterial testimony.

287 A. I have very frequently.

Q. Where is your place of business?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. American Bank building, Kansas City, Missouri.

Q. State whether or not you have frequently made sales of property and whether or not you are acquainted with the market value of property and in the changes of values of property in Kansas City and especially in property situated on the south side of Kansas City?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. I have been very familiar with the value of property in Kansas City and Hyde Park and Westport during the past 10 years more especially.

Q. Where is your residence?

(Same objection.)

A. I live 2110 Woodland avenue.

Q. That is in the southern portion of the city is it not?

A. In the southern portion.

Q. Col. Phelps are you familiar with Main street from 31st street to Westport avenue in that part of the street paved with asphalt by the Barber Asphalt Paving Company in the fall of 1897?

A. I am.

Q. You may state whether or not the lots and improvements upon that part of the street I have referred to front upon Main street.

A. I think they do in nearly every case. So far as I can now recall they do front east and west on Main street, and some corners side to it, but I am not certain about that.

288 Q. In what direction doed Main street *do*?

A. Main street runs north and south and the lots as a rule fron- east and west but I think there are one or two exceptions to that. 35th and Main I think fronts south and sides to Main street, but most of the lots front east and west.

Q. How are the improvements on the street constructed, that is with reference to which front?

A. I think where the ground is improved they all front on Main street either on the east or west side without exception. I think they do.

Q. Are you familiar with the property of Judge Field fronting on that street, that is to say lots one and two, block 39, and lot one in block 50?

A. Which do you mean, Thirty-ninth and Main?

Q. Hyde Park lots one and 2 block 39 and lot one block 50, Hyde Park?

A. I am familiar with that on the south side of 38th some fifty or sixty feet south of the corner running through from Main to Baltimore I should say 100 or 115 feet front on each street.

Q. You mean the frontage is about 100 or 115 feet?

A. Yes, sir that is 100 or 115 feet on Main street and 100 or 115 or 20 feet on Baltimore.

Q. Do these lots that you have referred to front on Main street

A. Part of it, yes, sir.

Q. Do they extend back there the usual depth of the city lots?

A. They do.

Q. You may state if you please your opinion as to whether or not the lots you have referred to were especially benefited by the construction of the asphalt pavement described in the pleadings in this suit, on Main street in front of that property?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Oh yes, I should think the ground was benefited much
289 more than the cost of the pavement.

Complainant moves to strike out the answer of the witness as not responsive to the question in stating that it has benefited the ground

the cost of the paving, on the ground that it is incompetent, irrelevant and immaterial.

Q. You may state whether or not in your opinion the market value of those lots was enhanced and increased by the construction of the said pavement on Main street in front of them?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial. The question is whether the law is constitutional or not and not whether there is a benefit.

A. I think the market value of those lots was enhanced by the paving to the extent of the cost of the paving and a good deal more.

Complainant moves to strike out the answer for the reason given in the motion for striking out the previous answer.

Q. Please state in money value to what extent the lots in question were especially benefited by reason of the construction of the said pavement.

Complainant makes same objections as to previous question.

A. Why to be liberal I should say eight or ten dollars a foot gross. I mean the cost of the paving considered.

Q. Do I understand you to give it as your opinion that the lots referred to are reasonably worth on the market from eight to ten dollars per front foot more after the construction of the pavement and by reason of the construction of the said pavement than they were prior to its construction?

Complainant objects to the question as incompetent, irrelevant and immaterial, the question being whether the law is con-
290 stitutional or not and not whether there is a benefit.

A. I certainly think they are worth from eight to ten dollars per front foot more. That is a very reasonable allowance.

Q. Please state whether or not in your opinion all of the lots fronting on that part of Main street on which the asphalt pavement is laid as aforesaid, were especially benefited by reason of the construction of the said pavement?

(Same objection by complainant.)

A. I think they were without any doubt to the extent already stated.

Q. Do you mean to say to the same extent that Judge Field's lots were?

(Same obj. by complainant.)

A. Yes, sir.

Q. Your statement is as I understand you, that all of the lots fronting and abutting upon this improvement were especially benefited by the construction of the improvement? Now if I understand you correctly will you kindly state what portion of the entire special

benefit sustained by all of the lots was shared by each particular lot abutting on the improvement?

Complainant objects to the question as incompetent, irrelevant and immaterial the question being whether the law is constitutional and now whether or not there is a benefit.

A. Just in proportion to the size of the lot. In other words each lot would be benefited especially just in proportion as the frontage of each lot bears to the total frontage of the ground abutting on the pavement.

Q. You use the word "frontage" Col. Phelps in referring to the size of the lots. Will you please state upon what basis lots
291 are uniformly sold in Kansas City?

Complainant makes same objection as above set out.

A. They are sold by the front foot the depth being from 120 to 150 feet deep but out sales are made and prices are made upon the front foot.

Q. Is that the usual method and basis of making sales of property in Kansas City?

A. Universally.

Q. Are you familiar with Baltimore avenue in this city from Hunter avenue to Westport avenue in that part of the street paved with asphalt by the Barber Asphalt Paving Company in the fall of 1897?

A. I am familiar with Baltimore avenue from 33rd street to Westport avenue.

Q. That covers the part of the street paved as indicated in the previous question?

A. It does.

Q. And are you familiar with lots seven and eight in block 39, lot one, block 49 and the south 15.17 feet of lot 2, block 50 Hyde Park?

A. I am.

Q. On what street do those lots front?

A. Lots seven and eight, block 39, and the south 15 and a fraction feet of lot 2 block 50 front west on Baltimore avenue some 50 or 60 feet south of 38th. That is the last named fifteen and a fraction feet, and lot one in block 49 is at the southwest corner of 38th and Baltimore avenue, being, I should judge, about 50 or 55 feet frontage on Baltimore avenue siding on 38th street.

Q. All of the lots named, as I understand you, front and abut on that part of Baltimore avenue hereinbefore described?

A. They do.

Q. You may state how the lots generally abut on that part of Baltimore avenue hereinbefore described?

A. They all front on Baltimore avenue either east or west on both sides of the street.

Q. And do they all extend back therefrom the usual depth
292 of the lot?

A. They do.

Q. You may state whether the lots last described were in your opinion specially benefited by the construction of the asphalt pavement described in the pleadings in this case on Baltimore avenue in front of them, and if so please state the extent of that special benefit.

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. I do. I think they were benefited to the extent of the cost of the paving and a good deal more.

Complainant moves to strike out so much of the answer as states "to the extent of the cost of the pavement and a good deal more" as not responsive to the question, in addition to the other objection.

Q. Please state in money value the extent of the special benefit to which you have referred in your last answer.

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. The same as in the other instance, eight or ten dollars a front foot very easily.

Q. State whether or not in your opinion all of the lots fronting and abutting on that part of Baltimore avenue on which the asphalt pavement was laid as hereinbefore described were specially benefited by reason of the construction of the said pavement in front of them?

Complainant objects to the question as incompetent, irrelevant and immaterial, the question being whether the law is constitutional and not whether there is a benefit.

A. I think they were.

Q. And to what extent?

(Same objection by complainant.)

A. To the same extent as already testified, from eight to
293 ten dollars a front foot.

Q. State whether or not in your opinion the lots abutting on that part of Baltimore avenue improved as aforesaid were worth more in the market after the construction of said pavement and by reason of the construction of said pavement, and if so how much?

Complainant makes same objection as above.

A. I think they were to the extent already stated, from eight to ten dollars a front foot.

Q. In what proportion would you say was the total benefits sustained by all the lots fronting and abutting on the improvement sustained by each individual lot abutting thereon?

Complainant makes same objection as above.

A. In proportion to the frontage of each lot.

Q. The frontage of each lot on the improvement?

Complainant makes same objection as above.

A. Yes, sir.

Q. Are you familiar with Wyandotte street from Hunter avenue to Westport avenue being that part of the street paved with asphalt by the Barber Asphalt Paving Company in the fall of 1897?

A. I am familiar with Wyandotte street from 33rd to Westport avenue which includes all that part of the street which was paved with asphalt by the Barber Asphalt Company?

Q. Are you familiar with lots three and four, block 41 in Hyde Park?

A. Yes, sir I am.

Q. On what street do they front?

A. On the west side of Wyandotte street about a hundred feet south of 38th street above grade five or six feet and are vacant.

Q. Do they front on Wyandotte street?

A. They front east on Wyandotte street, as I said before about 100 or 110 feet south of 38th street.

294 Q. Do they extend back therefrom the ordinary depth of a city lot?

A. They do.

Q. Please state the situation of all of the lots abutting on that part of Wyandotte street improved by the asphalt pavement as aforesaid with reference to the street, that is how they front.

A. You mean how they front?

Q. Yes.

A. They front on Wyandotte street east or west I think the entire distance referred to.

Q. Referring to the two lots last described please state whether or not each of them was in your opinion specially benefited by reason of the construction of the said asphalt pavement in front of them?

A. I think they were.

Q. To what extent?

Complainant objects to the question as immaterial and moves to strike out the answer to the previous question as incompetent, irrelevant and immaterial, the question being on the constitutionality of the law and not on whether or not there was a benefit.

A. Oh, from eight to ten dollars a front foot as I have stated in the other cases.

Q. You may state whether or not all of the lots in that part of Wyandotte street along which the asphalt pavement was laid as aforesaid, were in your opinion specially benefited by reason of the construction of that pavement and if so to what extent?

Complainant objects to the question as irrelevant and immaterial.

A. I think they were to the extent as already stated from eight to ten dollars a front foot abutting on Wyandotte street.

Q. In what ratio would you say that the total benefit to all the lots abutting on that improvement was accrued by reason of
295 the construction of the improvement was shared by each individual lot abutting thereon for the same reason?

A. The exact ratio as the frontage of each lot bears to the total frontage abutting on the street.

Q. You may state, if you please, and describe the situation of all of the lots described in the tax bills in controversy in this suit the numbers of which I have read you with reference to the several streets on which they abut and front.

Complainant objects to the question as ir-elevant and immaterial.

A. They all lie well as to the streets and they are above grade of the streets in nearly all cases about two or three feet above grade the exception being on Wyandotte street there it is as stated before about five feet above grade. They lie very handsomely in every case.

Complainant moves to strike out the answer the voluntary statement of the witness as to their lying very handsomely as not responsive to the question, incompetent, irrelevant and immaterial.

Q. You may state what effect as to the buildings and improvements on that part of these several streets heretofore described has resulted from the construction of those pavements?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Let me say outside of the answer——

By Mr. FIELD: Take it all down.

By Mr. SCARRITT:

Q. Just answer the question. Judge Field doesn't care for any side remarks.

296 A. Why it has had the effect of stimulating building very materially; on Baltimore avenue from 38th to 39th there is not very much building upon them, but whether it is because the lots have been off the market I can't say, but on Baltimore north of 38th there it is almost built up solid on the west side of the street with very fine houses and a good portion of the east side of Baltimore avenue from 37th to 38th is built with good houses.

Q. What do you mean by good houses?

Complainant makes same objection as last above.

A. Houses judging from their general appearance costing from four to ten thousand dollars apiece. The same answer applied to Wyandotte street but not so much as to Baltimore avenue. Wyandotte street lies just as well. Good residences are built on Wyandotte street and new residences are now going up all around in that vicinity on the streets I have named, Wyandotte, Baltimore and perhaps, Main street.

Complainant moves to strike out the answer of the witness as voluntary and not responsive to the question.

Q. Are the lots on these streets which as you say are not yet improves of substantially the same value of those that have already been improved?

Complainant objects to the question as calling for the opinion and conclusion of the witness.

A. They are.

Q. Please state the general character of the improvements that have been constructed on Main street along that part of which was improved by the construction of the asphalt pavement?

Complainant objects to the question as irrelevant and im-
297 material and calling for the conclusion of the witness and not the facts as we have shown the exact number of houses in that block and character of each particular house.

A. Not so many houses have been built on Main street as Baltimore and Wyandotte and I can't recall but one or two along at 36th and Main there. There is a very fine house that has been built there on Main street since 1897 on the points in controversy.

Q. Some of the handsomest residences in the city are located on that street are they not?

Complainant objects to the question as leading, incompetent, irrelevant and immaterial.

A. Yes, sir, one of the most valuable houses in that vicinity is on Main street about 35th and Main and one across the street the owner's name I do not know, a fine stone house on the northwest corner.

Q. Judge Ellison's home is farther out?

A. I do not know Judge Ellison's. That is as to its being his home. The improvements and sales have been largely on Baltimore and Wyandotte.

Q. What are the improvements in the way of residences erected upon the pavements that we have referred to either during the time of the construction of the pavements or immediately since reasonably worth?

A. They are houses as I have already stated that in my judgment I should think they are worth from four to ten thousand dollars apiece exclusive of the ground.

Q. The total?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Well the total improvements on these three streets from say 37th street to Westport avenue would be two hundred to two hundred and fifty thousand dollars, that is an estimate by general observation without any careful examination of the houses.

298 Complainant moves to strike out the answer as the mere conclusion of the witness and not based on any computation or account as stated by the witness himself, and also for the reasons heretofore given.

Q. All of these streets that we have referred to extend in a north and south direction, do they not?

A. Yes, sir.

Q. And are continuations of streets of similar names in the heart of Kansas City?

A. They are.

Q. State whether the traffic from that section of the city is in a north and south direction and whether or not there was a public necessity for these improvements at the time that they were made.

Complainant objects to the question as calling for the mere opinion of the witness and he is not competent to decide that question.

A. I think they were.

Q. Take the witness, Judge.

Cross-examination by Mr. FIELD:

Q. You say that Baltimore avenue and Wyandotte streets on these pavements in question were extensions of streets north of them?

A. They are supposed to be continuations of the streets north of there.

Q. Do you mean on maps or the streets?

A. On the streets.

Q. Do you mean to say that Wyandotte street runs north to Kansas City?

A. Neither one of them, Baltimore or Wyandotte, are open north of 33rd but there is a break to 29th.

Q. Suppose you were coming north from Wyandotte or Baltimore avenue there over these pavements in question how would you get to Kansas City, coming north from the end of these pavements in question?

A. The best means would be to turn east to Main street or
299 you can go west on 33rd to Broadway and then into the city, or Penn street.

Q. What I understand you to say now is that the north line of these pavements in question comes to a dead end there?

A. At 33rd street.

Q. On Baltimore avenue and Wyandotte street?

A. Both.

Q. And in order to get into Kansas City you would have to leave those streets at those points and come east to Main street or go west to Broadway?

A. Broadway or Penn.

Q. Then it is not a fact that Baltimore avenue and Wyandotte are continuations of streets of the same name in Kansas City?

A. I think they are continuations of streets of the same name but they are not open through. There are two breaks.

Q. Baltimore avenue and Wyandotte street north of 33rd are not open?

A. They are not open to 31st, and then from 31st to 28th they are open.

Q. Well to use the streets then coming to Kansas City, Baltimore avenue or Wyandotte either north of 33rd street, you would have to go to Main street or Broadway and you would have to come back after going two blocks north, come back to Baltimore or Wyandotte?

A. Wyandotte street is not open through there at all.

Q. Only from 29th to 31st north of 33rd?—Now isn't it rough ground through those two blocks where you say there is no street?

A. One part is a park with handsome grass and trees.

Q. Well it is low ground.

A. It is low but has never been platted.

Q. Then it is not public property at all?

A. Between 33rd and 31st.

Q. Then these two pavements on Baltimore avenue and Wyandotte street are not continuations of Baltimore avenue and
300 Wyandotte street in Kansas City?

A. They are not opened through.

Q. They are very rough continuations?

A. There is a break there, it is a handsome park, it is not platted.

Q. It runs back to a very low pond?

A. It runs northwest to a lake.

Q. So then the travel on these pavements in question is not connected north on Wyandotte or on Baltimore avenue on these streets?

A. Not continuously.

Q. You have got to leave those streets on the north line of these pavements and go either west to Broadway or come east to Main street?

A. That is right.

Q. Now these three pavements are very close to each other, are they not?

A. Yes, they are parallel streets.

Q. Do you know the distance from Main street to Baltimore avenue?

A. Two hundred and fifty or seventy five feet.

Q. Do you know the distance from Baltimore avenue to Wyandotte street?

A. About the same 250 or 275 feet.

Q. Now there are two parallel streets, a mile of pavement on each street is there not?

A. Just about.

Q. Now is that the only part of Kansas City or suburb or Kansas

City out there?—we have 2000,000 people here or claim to have do we not?

A. Yes, I think we have.

Q. Now the matter has not been made very clear,—I think these matters are irrelevant and immaterial but I wish you would tell me if there is any other part of Kansas City where people live except out there?

A. Oh, yes, east of Main street in Hyde Park is a very handsome part, and take south Troost avenue.

Q. Well take it north of 15th street, the old part of Kansas City, isn't it more densely populated?

A. Yes, sir.

Q. That is a totally different part of town?

A. Yes, sir.

301 Q. It is better settled up?

A. It is more thickly settled because it is an older part of town, but I would not say "better" settled up.

Q. Is it more built up?

A. Yes, sir.

Q. So the bulk of the population lies north of 15th street?

A. It always has so far.

Q. Do you know when this property came into Kansas City, Hyde Park?

A It has been in twice, the last time I think it was 1896, or 1897.

Q. Well the first time was a failure wasn't it?

A. The supreme court said so. In 1887 or 1888 it was taken in and 1897 it was taken in again.

Q. That was declared void, the first time?

A. It was declared unconstitutional. It was an amendment to the charter.

Q. Now do you know when this Hyde Park was taken into Westport?

A. No, I do not know the year.

Q. Don't you remember it has not always been in Westport?

A. Oh, yes, east of Main street.

Q. I mean north of 39th street, don't you know that was not taken into Westport until 1891 or 1892?

A. I do not know when it was. The old Westport was south of Westport avenue.

Q. Well al- that in Hyde Park proper, none of it was in Westport?

A. This property, I think not.

Q. That was just a common there, wasn't it?

A. Yes, sir, owned by the Mastins.

Q. Do you know what property was worth there twelve years ago or thirteen years ago?

A. That would be 1887?

Q. This territory now?

A. Yes, sir, I am talking about this territory this Hyde Park district. That would be an opinion because one's memory can
302 hardly go back 13 years and quote figures, but that was the height of the boom in Kansas City and probably that land if it had been put on the market it would have sold for somewhere in the neighborhood of $15.00 a foot.

Q. That is all you remember about it?

A. You see there was none of it in the market, nobody thought anything of that country at that time.

Q. Not in 1887, didn't think anything of that country?

A. No, sir.

Q. You did not know Mr. Mastin paid $40 a foot for that property?

A. The real estate men were not turned very much to that country out there.

Q. You do not know Mr. Mastin paid $40 a foot for that property in 1887 and 1886?

A. He may have but I do not remember of it.

Q. Do you know what he sold the same property for to Mr. Finlay?

A. He might have sold it $20 to $25 a foot. There has been a great depreciation in ten years.

Q. I understand you to say property was not worth more than $15 a foot there in 1887?

A. I said my memory was not very good out there because I figured very little out there. It might have been worth more and maybe less,—my tes*y*imony is not very valuable on that property.

Q. How long do you say you have been in the real estate business?

A. Eighteen years.

Q. Pretty active?

A. Oh, yes sir.

Q. Property has been very dull here for ten years after 1887?

A. Yes, sir, a great depreciation.

Q. How long was it dull? How long before any activity was reresumed?

A. The top of the boom was in the spring of 1887 and it
303 began to decline steadily to 1890 and from 1890 and 1893 when the banks failed here there was a little spurt upwards and then it went down until 1897 or say 1896, and since then prices have held their own but they haven't advanced but very little until within the last 15 or 20 months.

Q. You mean throughout the city?

A. In some places there was not a dollar's decline throughout the whole depression.

Q. Well do you know whether that property out in Hyde Park, whether it didn't stand the depression better than any other part of town?

A. I do not think it was very much in the market at that time, 1887 or 1888. They began to build up Hyde Park east of Main

street about 1890 and I don't think Judge,—I think your intimation is about right that east of Main street they did suffer the depression less than any other portion of the city because they were building under restrictions and they were trying to build up a nice part of Kansas City.

Q. There are building restrictions out there yet?

A. I think they hold yet. Whether they are west of Main street I do not know.

Q. How do you know about that?

A. It is my experience on ground I have handled and sold out there.

Q. Where have you sold anything there lately?

—. I have had four or five pieces there.

Q. Just tell whose places they were please?

A. Do you mean between Main and Broadway?

Q. Yes.

A. I am agent for some considerable ground in there but within the last years since prices have been strengthened quite a good deal I do not believe I have sold a foot in there, I have handled it in Wyandotte street. No, sir I have not.

Q. Well this property you have been talking about that I am interested in is all west of Main street?

A. Yes, sir.

304 Q. Well you do not know of anything that has been sold over there?

A. Oh, yes it has been sold.

Q. Well that you know anything of?

A. There has been a good deal sold on Wyandotte street and on Baltimore avenue north of you and by the church.

Q. That is the property Finlay owned?

A. There have been a good many pieces bought and sold out there.

Q. Who do you know out there within a block of me that sold any ground except Mastins?

A. Jewett.

Q. Where is his property?

A. South of the property.

Q. South of 39th?

A. Yes, sir.

Q. Who conducted his sale?

A. I do not know, some one else.

Q. How much did he sell?

A. He had in round numbers 80 feet south of the church.

Q. You do not know what he got for it?

A. $40 a foot I think.

Q. Do you know it?

A. I could not swear to it for I did not sell it but that is my belief.

Q. Do you know anybody that will give $40 a foot for property

between 38th and 39th on the east side of Baltimore avenue, my property?

A. Well I don't know if you could get over $35 a foot for that or not,—it is not built up much yet.

Q. It is all vacant?

A. It is vacant unless it has been built up lately.

Q. There is not a house in that block, is there?

A. You mean on Baltimore? No, sir, neither on Main, just a green house.

Q. Neither on Main or Baltimore in that block is there a house except a green house?

A. Yes, sir.

305 Q. You mean a glass house for flowers?

A. Yes, sir.

Q. How far from Kansas City is 38th street, that is north of anything I have,—take the junction here, that is considered the center.

A. They call it three miles to Westport. That would be two miles or a little over. They call the Harris house three.

Q. Do you think it is a mile from my property to the Harris house?

A. Yes, sir, the Harris house is over on Penn.

Q. Now most of this property is vacant and also my property?

A. Yes, sir.

Q. On all three streets from 33rd street, the north line of these avements, to Westport avenue the south line?

A. No, sir I should say nearly half of it is built up, but there is a good many stretches of vacant property there.

Q. Now take Main street. I have a map here. Take Main street,—the south line of Kansas City used to be 31st street or Springfield avenue?

A. Yes, sir.

Q. And since 1897 Westport was taken in and it extended farther south?

A. Yes, sir.

Q. Now what part of Main street is most built up,—is it the south part?

A. Yes, between 31st and 33 and between 37th and 38th has the chief improvements. Chief improvements and chief in value.

Q. Do you call those valuable improvements on the east side of Main street between 31st and 33rd?

A. Well they are cheap improvements.

Q. There is a suburban store?

A. Yes, sir.

Q. And there is a story or story and a half house?

A. Yes, sir I do not think they are any special improvements unless you consider it business property, which I suppose it always will be there.

306 Q. There is only one business house in that block?

A. There are three or four.

Q. But the balance of the houses in that block are small a insignificant?

A. On the east side of the street.

Q. Well on the west side of the street are the two Parsons hous They are no special credit,—you remember them?

A. Yes, sir.

Q. They are no special credit?

A. They are not a disgrace to the street, but they are not ve beautiful.

Q. Now Mr. Slavens has some very good houses?

A. Yes, sir.

Q. Now across the street between 32nd and 33rd on the east si of the street right opposite those Slavens has?

A. It is where Charley Finlay is. You are farther south.

Q. I mean 33nd and 33rd.

A. The northeast corner of 33rd and Main has two very dece houses Charley Finlay built and then there is another street sou of Robinson's that hasn't got any houses.

Q. What street is it north of Major Warner's?

A. He is down near 34th.

Q. Well between 33rd and 34th?

A. I do not know of any house Finlay has built on Main stre *A*. Farther north there are two extra streets in there. Robins has a good house.

Q. He fronts on Main street?

A. Yes, sir.

O. Now there are no great number of houses from 33rd stre down to Westport avenue, are there Mr. Phelps?

A. Well there are some good houses.

Q. I say there are no great number?

A. Not probably over fifteen or twenty altogether.

Q. Well are there that many?

A. I should have to reckon to see whether we have got all them.

307 Q. Well there is Major Warner's house, the Talbott pla and Seested on the east side?

A. Yes, sir.

Q. Three houses and that is all?

A. Yes, sir.

Q. Now on the west side between 33rd and 34th, there is not single house and that is a block 900 feet long, isn't it?

A. Yes, sir.

Q. Now take the block between 34th and 35th there is a fl there?

A. There is a big block there, there are four or five on Mai street——

Q. That is up on the corner of 34th and Main?

A. Yes, sir.

Q. And there is a distance south of them for 300 feet that vacant?

A. I do not know but I think it is all vacant.
Q. Now on Main street between 33rd and 34th except this building of flats there is not another building there?
A. I think not.
Q. Now take the block opposite, how many houses are there there?
A. One.
Q. It is the Taylor house?
A. I do not know who owns it.
Q. It is a stone house?
A. Yes, sir.
Q. That is a long block?
A. A good lengthy block.
Q. Blocks are unusually long out there?
A. On the west side of the street they are.
Q. Now take from 35th to 36th the Mastins house is there.
A. A single house.
Q. Now on the west side of Main street in that block how is it?
A. It is all vacant.
Q. Now between 36th and 37th there are some little brick houses in there?
A. Fair houses. They might be better and might be a good deal worse. They are houses, the property that sold for four
308 or five or six thousand dollars may be.
Q. You mean the houses and lots together?
A. Yes, sir.
Q. You take 50 feet of ground and a house together they bring four or five or six thousand dollars?
A. Yes, sir.
Q. Do you know of any of them selling for that lately?
A. No, sir.
Q. They were built along back before the boom fell out?
A. No, not in 1887 but since 1890.
Q. They are not very good houses?
A. They are not so good houses as you are building out there now.
Q. Do they add anything to the value of the street.
A. I do not think they detract anything because they are respectable looking brick houses.
Q. Do they add anything?
A. Oh, yes, I do not think they detract anything.
Q. Do you know whether there is a draw there or not?
A. Yes, that is the lowest place there.
Q. Now across the street there is one house?
A. Yes, at the corner of 37th and Main.
Q. Those blocks are about 500 feet long?
A. They are good long blocks on the west side of Main.
Q. Well on the east side?
A. They are just the same below 37th street.

Q. Now take down to 38th street, how many houses are on the east side there?

A. I do not think there is a house,—there may be one.

Q. There is a new stone house you referred to at 38th and Main?

A. Yes, sir.

Q. That has been put up since the pavement?

A. Yes, sir.

Q. It was vacant that whole block at the time of the paving?

309 A. Yes, sir.

Q. Now take the west side of Main street between 37th and '8th?

A. I do not recall but one house there.

Q. Well there are three or four on the west side of Main?

A. Oh, yes.

Q. Now you skip a number of vacant lots to the stone house built within a year or so since the paving?

A. Yes, sir.

Q. And then you come to Judge Ellison's house at the corner of Thirty-eighth and Main?

A. I did not know that was his house.

Q. Now there are just three houses on the west side of Main street in that block?

A. I think so.

Q. Now those are long blocks, all of them?

A. Good length, yes, sir.

Q. These houses you have been speaking of except Mastin's they are built on fifty to a hundred feet of ground, I mean the premises occupy from fifty to a hundred feet?

A. I do not know of any that occupy more than 100 except Mastin's and he has the whole block. Except the Taylor house.

Q. Well that is perhaps a little more, and the balance of the block is vacant?

—. Yes, sir.

Q. Now coming on down from 38th to 39th on the east side of Main street, how many houses are there?

A. I do not know.

Q. Two, Mr. Russell's house and a brick house?

A. I think there are two, you are right.

Q. Now on the west side of Main street where the first property of mine is you come to, that property is vacant except a green house?

A. I think so.

Q. Now from 39th to Westport avenue is vacant?—do you know my property, block 45, Hyde Park?

310 A. Yes, sir that is very handsome property.

Q. The car barn is directly across the street?

A. Yes, sir.

Q. Then there are some little stores on the east side of Main street south of the cable house?

A. Yes, sir.

By Mr. SCARRITT:

Q. The block is built up solid?
A. Very nearly.

By Mr. FIELD:

Q. The car barn covers most of that block?
A. Over half of it.
Q. Doesn't it cover two thirds of it?
A. Well over half I should think.
Q. That is the terminus of the cable railway and that is the reason for that business?
A. It naturally would be built up with business.
Q. They are talking about extending that cable farther south?
A. Yes, sir.
Q. When that is done how will that affect that business there?
A. I think it will help it, make it a business center.
Q. You think to break up the terminus and make it ten blocks farther south, that that will help the property for business purposes?
A. I think it will.
Q. How do you ar-ive at that?
A. I never find a terminus gives any particular value to property. Take the eastern terminus of the Ninth Street cable, they have built up a little business there and the ground is worth about $20 a foot, and the eastern terminus of the Fifteenth Street line a similar condition prevails.
Q. There had been no change of termini out there in these cases you have made?
A. In those two cases, no, sir.
311 Q. Do you know of any cases where the changing of the terminus helped property at the terminus?
A. Yes, I think at 18th and Olive the terminus of the cable road, it has made 18th and Olive a very good business center while at present the terminus there is no business at all.
Q. Now at Westport avenue that stopping to trade at those stores when getting on and off there, isn't that the reason for the value of property at the terminus?
A. I am inclined to think that a little business is built up from that fact but not from that fact only—it is very thickly settled around there. I think that purely a terminus and nothing else would add to it.
Q. You think that if they break up that terminus it will help the business property?
A. I think that little business hurts your property there. I think you have nice residence property, it is too good for business property.
Q. You think the extension of that terminus will help my property that fronts on the car barn?
A. I think it will.
Q. Suppose the car barn remains there?

A. I do not think the car barn is particularly valuable to you but you are there, but if they move the car barn away I think it will help you.

Q. They are not talking of moving it away?

A. I understand they are and are going to put the car barn below Nelson's.

Q. Do you want me to pay for this pavement because they are moving this car barn?

A. No, sir I am not particularly interested in that.

Q. If the car barn remains there my property is not very valuable?

A. Yes, sir, it is.

Q. Do you think that a person would want to build a fine residence fronting on a car barn?

A. Well there is — school house and my experience as a real estate man would be this——

312 Q. You think the chief value to my property is for school house or church?

A. No, I think you and I have the same thing in mind, it is neither hay nor grass.

Q. There is nothing you could do with it?

A. You could build income houses on it.

Q. What kind?

A. Renting from $25 to $30 costing you $2000 to $2500 apiece.

Q. That would rent for twenty-five or thirty dollars?

A. Yes, sir.

Q. How many of those houses can I put on a lot?

A. Well one for 33⅓ feet.

Q. Then you think I can make an investment in little houses on thirty-three feet of ground costing about $2500 apiece and renting from $25 to $30 apiece?

A. Yes, sir.

Q. You think that is the very best use I could put it to?

A. Well then you might put stores there.

Q. Westport proper where most of the people live is southwest of my property?

A. Oh, the new growth is in that vicinity, the new world is around you.

Q. That Main street is travelled by people who live in old Westport?

A. I think not now. I think most turn off at 33rd street.

Q. It is not a great thoroughfare down by my property?

A. It is not so great a thoroughfare but it has the cable there.

Q. It is the cable that makes it valuable?

A. If that street was not paved you would not have carriages driving by there.

Q. Well if my property is green grass by putting up these
313 houses costing $2500 where do I come in on anything?

A. That would pay you a fair income. $3700 adding on the value of the lot, and it would pay you eight per cent. counting your lot $40 *of* foot.

Q. You think there would be about eight per cent. income on the gross value of the lot and this $2500 house?

A. Yes, sir.

Q. Now then what if a man hasn't got the money to build with?

A. You can borrow it at six per cent.

Q. Then that leaves me?——

A. Two per cent.

Q. And I have got to be out of tenants some months?

A. No, sir, it would leave two per cent. because you have the ground paid for.

Q. I have to pay taxes?

A. Yes, sir.

Q. And I have to pay for street pavements?

A. You have got them there now.

Q. They are only guaranteed for five years?

A. But they are continuing longer than that, you have them there that were there for ten years.

[Complainant moves to strike out the answer as incompetent, irrelevant and immaterial.

Q. Now suppose you did not have the money to build houses would you rather wait until you could put improvements there that would give such an income as would justify the improvements or would you put up these improvements you have suggested?

A. Well considering the character of the stores and houses there I believe I would put up a few respectable houses and get the income from them.

Q. You would go and borrow the money and pay six per cent. interest and be annoyed with architects, builders, and all that?

A. Well, we have to be annoyed with investments of any kind.

Q. Well leaving Main street out of the question what do
314 you consider the future of this property?

A. Leaving Main street out of the question that Baltimore property both north and south of 39th, and the Wyandotte Street property, the outlook is fine. One year ago ground was sold across from that property on Wyandotte street from twenty-six to $28 a foot. I think Finlay bought some there. Within the last six months ground cannot be bought for less than $35 a foot and I consider your ground there worth that to-day. You have a corner on Broadway I do not think you would look at less that $40 a foot for.

Q. Suppose I was offered $35 or $40 a foot for that corner you are speaking about before the pavement — what would you think of it?

A. Well I would have sold it before the pavement went in, but our hind sight is better than our foresight.

Q. Suppose that I sold that property where that church is built for $55 a foot in 1889 or 1890?

A. I should think you were a wise man.

Q. You think it is not worth such money as that now, do you?

A. I think it shows it wasn't worth such money, that that was a fictitious value.

Q. Real estate hasn't had anything but taxes in the last ten years?

A. Well we sold them squirrel tracts that had no practical value, but now we well them tracts with sewers and streets paved.

Q. Now you say property sold opposite mine within a year for how much?

A. I think it sold for about twenty-eight dollars a foot a year ago, west front there.

Q. Where is that?

A. Right opposite J. E. Cole and I had his for sale for $33.

Q. It was within a year you say?

A. About a year ago, he bought quite a large tract there.

315 Q. This pavement has been laid down over two years?

A. I understand he bought at wholesale 100 feet, he built all those houses in there.

Q. Don't you know Finlay bought all that ground where he built those houses in there?

A. Well he bought a good deal. 447 feet was sold day before yesterday, on Baltimore avenue north of 38th for $40 a front foot.

Q. Real estate has been a drug on the market and slow property during the last twelve years?

A. It has been of very slow value. I think those improvements have helped it wonderfully.

Q. You do not give McKinley any credit for it, or the administration any credit for it?

A. Yes, I do.

Q. Do you think the pavements have helped much?

A. I think this era of improvement although it may in some instances have been overdone, I think has helped up in starting the price of real estate I mean ground you could not sell at all before the street was made you can sell it readily for the price you asked plus the improvement. I have on my book a tract that I could not sell for $12 a foot before the street was paved that sold yesterday for nineteen dollars a foot and assumed the granitoid walk.

Complainant moves to strike out the answer as a mere voluntary statement, incompetent, irrelevant and immaterial.

Q. You have got to have the people here and got to have a demand for the houses before there is any demand for the real estate?

A. They are coming and we can't find the houses for them to live in.

Q. Kansas City has increased in population in the last year or two?

A. Yes, sir.

316 Q. Before that there was a decrease?

A. I think there was a decrease to 1894, but our real estate transactions for March were over a million and the first half of this month over half a million.

Q. Suppose we take the street car away from here and had to go out to Westport by horse car like we used to or walk or ride, what do you think of that?

A. Why Judge Field such a proposition would not live a minute. Take the cable away from there and put the horse car there it would take us back 20 years.

Q. It would take about eighty per cent. off the value of the ground out there?

A. I don't know,—there are so many fine houses.

Q. Don't you know that ground sold to the Hyde Park Company for a thousand dollars an acre before the cable?

A. Well Baird sold it about ninety.

Q. It changed hands before that?

A. Some but not much.

Q. That property where Mr. Armour is there sold for a thousand dollars an acre before the cable was started?

A. I do not know.

Q. The cable system of transportation out there is what increased the value of that property?

A. It has brought it into the market.

Q. Made it nearer town?

A. Yes, sir, the same as Troost Avenue cable and South Prospect. I think the real estate men and cable men have done more than any other two agencies to build up the town. We have showed our belief in putting our money in the property.

Q. You spoke about this property of Finlay's, these houses between 37th and 38th being fine houses,—do you know the actual cost of those houses?

A. No, sir I do not know who built those houses but I went along there this morning and I was surprised to see the apparent fine houses that have gone in just north of you.

Q. That is north of my property?

A. Just across the street.

317 Q. It is a continuation of the same street?

A. Just fifty feet.

Q. Don't give me the idea that my property is building up,—right opposite?

A. Just across the street.

Q. When were you out there?

A. I was out there this morning.

Q. What did you go out there for?

A. I went out on real estate business.

Q. Who went with you?

A. I went alone. I went out there to look this particular ground over.

Q. You went to look my ground over this morning?

A. That is one of my chief reasons. I would not have gone if it had not been for that he told me yesterday they wanted to use me as a witness.

Q. In my case?

A. Yes, sir, in your case.

Q. And you went out to look the ground over this morning before testifying?

A. Yes, sir, that is one of the reasons.

Q. What else did you go for?

A. I had a house 3954 Wyandotte street I had some work done on and I wanted to inspect it before I paid the bill, as I usually do.

Q. Whose house is it?

A. It belongs to a man in New York.

Q. Did you go over to that house?

A. Yes, sir it is right across from where ex-Mayor Rieger used to live.

Q. You testified that you have been very frequently a juror?

A. Yes, sir, I have.

Q. How long since you have been on a jury in a condemnation case?

A. I am on four now and I have just come from two now.

Q. You were on the North Terrace case?

A. You thought I was, and there were six thieves on that jury,—that is what the papers say you said.

Q. Now Mr. Phelps you were very frequently a witness in these condemnation cases?

318 A. I have been a witness in a great many cases where the question of value came up or where expert testimony was used.

Q. Who were you a witness for, the city or land owners?

A. As a rule for the land owners.

Q. Whose lands were taken?

A. Yes, sir. I have been by the city.

Q. Employed by parties to look up the values and then come and testify?

A. Yes, sir.

Q. You are known as a sort of expert on the values of real estate in Kansas City?

A. I do not know what my reputation is. I hope it is in favor of Kansas City. I have been a witness, yes, sir.

Q. And you have been frequently a witness for the parties whose lands were taken, as well as a juror?

A. Yes, sir.

Q. How does it happen that you are taking such an interest in this case against me?

A. Not the least interest in the world.

Q. How does it happen you take enough interest in this case to go out and look this ground over?

A. They asked to take my testimony and I wanted to go look it over so I could answer. If you would ask me to look I would.

Q. Isn't there a little feeling in your heart against me?

A. In this case?

Q. Just generally.

A. I do not have any exalted opinion about the remark the newspapers said you made about the North Park commissioners.

Q. Aren't you sore at me about attacking the North Terrace park?

A. No, sir, only I do not think you ought to have said what you did.

Q. Do you think if I had not taken the position that I did in the North Terrace case and impugned your action as a juror that you would have gone out there and looked over that ground to testify in this case?

A. Certainly I would.

319 Q. Are you in the habit of giving people your time for nothing?

A. No, sir I am not.

Q. You are getting pay for your testimony in this case.

A. I do not doubt it.

Q. How much are you getting?

A. I have not said a word about it. Mr. Scarritt is the one.

Q. Do you expect anything beyond your witness fee?

A. Yes sir I certainly do.

Q. It is customary for real estate men to require an expert witness fee?

A. Yes, sir, certainly where they are expert witnesses.

Q. Then you are employed by that side of the case?

A. I have not had any talk with the Barber Asphalt Company to ask them what they would pay, or they haven't asked me. It is purely a business transaction.

Q. I wanted to see why you were going out and looking over my ground.

A. You did not think I was trying to make a case against you did you?

Q. Well I did not know. Do you know how much this asphalt paving is costing in front of my property out there?

A. Well I do not know. In the neighborhood of four dollars a front foot, what it usually costs.

Q. Do you know anything about the different brands of asphalt?

A. Yes, sir.

Q .Is there anything in the world except Trinidad Lake.

A. Yes, sir, Gilsonite. They are going to pave in front of my place with it.

Q. How is it?

A. I think it is pretty good.

Q. How long have they paved with that stuff here?

A. I think three or four years.

320 Q. 1896 was the first,—there was a good deal of paving here in 1896 or 1897?

A. I think about three years ago.

Q. What kind of asphalt do they use?

A. I forget the technical name.

Q. Trinidad Lake?
A. No, sir. They make a good pavement.
Q. Nineteenth street was a good pavement?
A. It satisfied me. It is the general opinion that the Barber is the best but I don't know as to that.

Complainant moves to strike out the statement that the Barber's is the best as not responsive to the question, incompetent, irrelevant and immaterial.

Q. Who is there here that lays this Trinidad Lake asphalt?
A. The Barber Asphalt Company and I think the Rock Creek, I think they lay some.
Q. Those are the same people, are not they?
A. I do not know about that.
Q. They have the same lawyers, don't they?
A. I do not know about that. I understood they were entirely different companies, and the Parker-Washington, they lay a good deal in Kansas City, Kansas, just now.
Q. Did you ever know of this Rock Creek Company laying any Trinidad Lake?
A. Of my own personal knowledge I do not.
Q. Don't you know that the Barber Company has been hiring the lawyers that represented this Rock Creek Company and have been trying to run them out of business?
A. No, sir I do not know that.
Q. Don't you know that this Rock Creek Company lays the same that the Gilsonite company lays, the bituminous rock?
A. No, sir.
Q. Well, do you know anything about it?
A. Well I ought to know because I just signed a petition for it.
321 Q. Well the only one that lays the Trinidad Lake is the Barber Asphalt Paving Company?
A. I do not know.
Q. Well when you signed for Trinidad Lake asphalt who did you understand you signed to lay it?
A. I never did sign for it.
Q. Well who would you understand?
A. Well I know the Barber Company laid Trinidad Lake and they make a mighty good pavement.

Complainant moves to strike out the statement "they make a mighty good pavement" as not responsive to the question and incompetent, irrelevant and immaterial.

Q. Do you know how they circulated petitions?
A. By their agents I believe.
Q. They go around and get a petition up petitioning to the city authorities?
A. Yes, sir.
Q. That is a rule the public officials have?

A. I think it is a rule they have to give the people a chance to select.

Q. Do you think they want the people to select or have one or the other?

A. I think the people are opposed to open specifications.

Q. You think they do not want open petitions?

A. Yes, people want either the Trinidad Lake or the Gilson. What I mean by open specifications is just to call for asphalt and let the companies come in and bid.

Q. You think the people here are opposed to competition?

A. No, sir I do not.

Q. Well how are they going to have competition if the board of public works refuse to let them have one or the other?—Do you mean to say the reason they require a particular asphalt to be named in the petition is because they are in favor of competition or are not in favor of competition?

322 A. I think the people are no doubt in favor of competition, but there is also little doubt but what they are in favor of the Trinidad asphalt regardless of who puts it down.

Q. Do you know anything about the Barber Asphalt Company being very active in politics in this city?

A. I am not in politics in this city and have not been for ten years.

Q. Don't you know there are three very active factors in politics and the Barber Asphalt Company is notorious as one of the factors in setting up in Kansas City municipal tickets?

Counsel for defendant objects to the question as outside the issues of the pleadings.

A. I do not know that such is the fact because I am not in politics.

Q. Is not that the common information?

A. I have heard the remark that some of these corporations are trying to influence our city election but I do not know that.

Q. Don't you know that as much as four years ago it was an issue here of whether the Barber Asphalt Company was going to control the election?

A. I do not know that it was the Barber Asphalt Company, but there has always been more or less charge against the Metropolitan.

Q. Has not the Barber Asphalt Company both by its agents and attorneys?

A. No, sir, not in the last two years that I know of.

Q. How about our friend Scarritt here, isn't he a politician?

A. I never knew of Mr. Scarritt being a politician any more than voting like any other good citizen.

Q. You do not know of them being active in politics for eight or ten years past?

A. Well I don't know as I ever saw them in politics any more than I have seen you in politics.

323 Q. You never saw me in a convention in my life?

A. Yes I was a good supporter of yours and I voter for you, but in the last few years I haven't heard of your being in politics.

Q. How about the McGowans?

A. Well he was for years strictly a politician and afterwards when he was engaged with the Barber Asphalt Company his hand was not seen if he was in politics.

Q. Isn't he one of the bosses here?

A. He used to be called that.

Q. Isn't he pretty well known as a potential factor?

A. He used to be known as a strong factor.

Q. He did not quit politics after he ceased to be marshal did he?

A. I do not know as he did, but it has been sometime since Mr. Hugh McGowan has been known as actively connected with politics in Kansas City.

Q. Well he does not live here now?

A. No, sir.

Q. He was living here in 1897 at the time of these pavements?

A. Yes, sir.

Q. He finished them before he left?

A. There has been a great deal since he left. I see by contracts awarded this morning the Barber Asphalt Company is very popular with the Kansas City people.

Q. Or Kansas City council?

A. The Kansas City council or people.

Q. Well the Kansas City council is composed of people who were recently served with an injunction by our friend Scarritt?

A. Yes, sir I saw his name to it.

Q. Well those are the people with whom they are so potential?

A. Well I do not know.

Q. Well speaking of Wyandotte street, did you go to Thirty-third where the Redemptorist Fathers are?

A. No, sir.

324 Q. Now is there a single house on the east side of Wyandotte street from Thirty-sixth to Thirty-third street except Mr. Keith'ss barn up next to 33rd?

A. Mr. Keith lives on Baltimore avenue.

Q. I say outside of his barn fronting on Baltimore avenue, on Wyandotte street I ask you if there is a single house?

A. There are two or three houses between 33rd and 34th streets.

Q. On Wyandotte street?—you are thinking about another street.

A. I haven't driven in there for two or three weeks.

Q. I am talking about the east side of Wyandotte street.

A. There is one on the corner of 34th and Wyandotte I think. There are not many houses. It has been recently pushed on the market.

Q. I will ask you if there is a sidewalk from 33rd to 36th in either of those blocks?

A. I think from 33rd south for a distance there are no walks.

Q. Now these buildings you are talking about on Wyandotte

street that are dense and numerous, what part of Wyandotte street were they?

A. Thirty-seventh south. From 37th south to Westport avenue Wyandotte street is fairly built up.

Q. But there are plenty of vacant lots in there?

A. Well not so vacant as to say there is a large amount of continuous vacant ground.

Q. You cannot pick out as great density of houses north of 37th?

A. No, sir there is not a great lot of houses there, it is low ground.

Q. So you can say from 33rd to 37th there are practically no houses?

A. From 33rd to 37th there are very few houses on Wyandotte. It is very low and not desirable ground.

Q. Now take some of my ground, take that in block 39 on Baltimore and Wyandotte, would you consider that nice and high
325 on Main street and Baltimore avenue south of 38th, did you see a hole there?

A. Yes, sir I do not think you are in a hole but you may be, distances are deceptive.

Q. Do you charge me up with that payment because of that fill in there?

A. No, sir I do not, but it looks very nice.

Q. Do you think you ought to charge me because I put that fill in there?

A. Well I think the percentage of increase, whether a hole or hill, the hole is increased ten per cent as well as the hill is improved ten per cent.

Q. Do you consider that property I am asking about anything like the Taylor or Mastin property for value?

A. No I do not think your property is quite as valuable as the Taylor or Mastin property.

Q. It is very much lower ground?

A. Not so much but it is some. You are not among the lowest, your ground lies very handsome very well.

Q. It is higher south?

A. Not a great deal. Your ground south of 39th lies very handsome in front of the cable house but I think the cable barn affects you even up on 38th.

Q. You do not think my ground is anything like as valuable as Mastin's or Taylor's?

A. I think it is worth from five to ten dollars a foot less.

Q. I will give you a commission if you will get me a trade for from $1 % to $20 a foot less.

A. Well you can have fancy ground as well as you can have fancy horses.

Q. Theirs is fancy ground?

A. Yes, sir.

Q. My ground is good enough for a $2500 house renting for $25 a month?

A. You have gone down to the cable house. That farther north I think is worth more. I think it is the same with a church or a school house, you have a *charge* on one side of you and a
326 school house on the other, but that is your misfortune.

Q. That is all.

E. H. PHELPS.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this 14th day of June, A. D. 1900.

[SEAL.] ALFRED FIDLER.
Notary Public, Jackson County, Mo.

Not being able to complete the taking of these depositions on this day, by and with the consent of the parties plaintiff and defendant to this action I adjourn the further taking of the same until to-morrow then to be resumed at the same place and within the same hours mentioned in the annexed notice and the caption hereof.

Given under my hand and notarial seal, April 12th, A. D. 1900.

[SEAL.] ALFRED FIDLER.
Notary Public, Jackson County, Mo.

Pursuant to adjournment as above stated, on this 13th day of April, 1900, between the same hours mentioned in the caption hereof and at the same place, counsel for all parties complanant and defendant being in attendance in person or by counsel, I resumed the taking of these depositions as follows:

WILLIAM S. WOODS of lawful age, being produced, sworn and examined on the part of the defendant deposeth and saith as follows:

Direct examination by Mr. W. C. SCARRITT:

Q. State your name, residence and business.

A. William S. Woods, Kansas City, Missouri, real estate and loans.

Q. How long have you been engaged in the business of buying and selling real estate in Kansas City?

327 Complainant objects to the question as immaterial.

A. About ten years.

Q. With what firm are you connected?

Complainant objects to the question as immaterial.

A. Whipple-Woods Realty Company.

Q. And where is the office of that company?

A. 110 West 8th street.

Q. The street floor in the Massachusetts building, is it?

A. The street floor in the Massachusetts building.

Q. You may state whether you are frequently called upon to estimate and determine the values of real property in Kansas City and whether or not you have acted on juries to fix the amount of benefits and damages in judicial proceedings occasioned by condemna-

tion proceedings in the condemnation of property for public use, and other public improvement proceedings?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. I have been called on quite frequently for just such work.

Q. Are you familiar with the situation and values of real estate on Main street, Baltimore avenue and Wyandotte street in this city between 31st street and Westport avenue?

A. Yes, sir, I am.

Q. I will call your attention to the lots involved in this controversy, that is to say the south 15 feet of lot one, block 50, lot one of block 39, lot two of block 39, all in Hyde Park, which abut on Main street and lots seven and eight, block 39, lot one, block 49, and the south 15.17 feet lot 2 block 50, all in Hyde Park, which abut on Baltimore avenue, lots 3 and 4, block 41, Hyde Park, which abut on Wyandotte street, and ask you to state whether or not you are familiar with these properties?

328 A. I know the property, yes.

Q. You may state whether or not all of the lots generally abutting upon Main street between 31 street and Westport avenue front on Main street.

By Mr. FIELD: If you wish me to I will admit to save the trouble of proving it that all the lots abutting on these three streets along the distance improved front on these three different streets.

By Mr. SCARRITT: With this admission the defendant will take no further testimony on the matter of the frontage of the lots.

Q. Do the lots all extend back from the streets on which they front the usual depth of city lots?

By Mr. FIELD: I will admit that too.

(Complainant admits this fact and with this admission the defendant will offer no further proof as to the depth of the lots.)

By Mr. FIELD: That is, I admit that they run to the center of the block from each of these three streets.

By Mr. SCARRITT:

Q. You may state whether such lots on that part of the three streets affected by these improvements, which have been improved, front toward the streets on which the lots abut.

By Mr. FIELD: I admit that too.

By Mr. SCARRITT:

Q. Are you acquainted with the market values of property along that part of the three streets I have named and were you so acquainted in the fall of 1897?

329 Complainant objects to the question as incompetent, irrelevant and immaterial.

A. I am.

Q. You may state, Mr. Woods, whether or not in your opinion the lots which I have heretofore described in my questions to you, which fronted on Main street were specially benefited and enhanced in value by reason of the construction of the asphalt pavement on Main street in front of these lots under the contracts referred to in the pleadings in this case in the fall of 1897.

Complainant objects to the question as incompetent, irrelevant and immaterial.

Q. And if so state the amount of said benefits.

(Same obj.)

A. I think the Main Street lots are benefited from at least eight to twelve dollars per front foot.

Q. State whether or not in your opinion the market value of those lots was increased by reason of the construction of the said pavement.

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. I think they were. It makes them more salable and adds fully as much as I have stated to the value of that property.

Q. Please state whether or not in your opinion all of the lots fronting on that part of Main street improved by the said asphalt pavement were specially benefited and enhanced in value by reason of the construction of the said pavement.

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. I think they were.

Q. In what ratio in your opinion was the total special benefit
330 sustained by all of the lots fronting on that improvement shared by each particular lot?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Well, I think that every lot fronting on the street whether it was a small or large lot was benefited about alike, fully eight to twelve dollars per front foot on account of these improvements.

Q. That is in your opinion the lots shared the total special benefit in proportion to their frontage on the improvement?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes.

Q. You may state whether or not the lots of Judge Field which I have described to you which front on Baltimore avenue were specially benefited and enhanced in value by reason of the construction of the asphalt pavement under the contract referred to in

the pleadings in this case in the fall of 1897 on Baltimore avenue between Hunter avenue and Westport avenue?

Complainant objects to the question as calling for the opinion and conclusion of the witness, and the question is incompetent, irrelevant and immaterial.

A. I think they were benefited.
Q. To what extent?
A. About ten dollars a foot.
Q. State whether or not in your opinion those lots, the market value of those lots was enhanced by reason of the construction of the said pavement?

Complainant objects to the question for the same reasons as stated above.

A. I think it was.

331 Q. To the same extent you have named as the special benefit?

A. Yes, sir.
Q. You may state whether or not in your opinion all of the lots fronting on Baltimore avenue along that part of the street improved as aforesaid were specially benefited and enhanced in value by reason of the construction of that pavement?

Complainant makes same objection as just above.

A. They were.
Q. And would you say that each lot sustained a part of the total benefit accruing to all the lots in proportion that the frontage of each lot bore to the total frontage of all lots on the improvement?

Complainant objects to the question as calling for the opinion and conclusion of the witness, incompetent, irrelevant and immaterial.

A. I would.
Q. Please state whether or not lots three and four of block 41 which I have heretofore referred to as fronting on Wyandotte street were in your opinion specially benefited and enhanced in value by reason of the construction of the asphalt pavement on Wyandotte street between Hunter avenue and Westport avenue in the fall of 1897 under the terms of the contract referred to in the pleadings in this case, and if so, the extent thereof.

Complainant makes same objection as set out just above.

A. I think they were benefited ten dollars per front foot.
Q. State whether or not in your opinion all of the lots of Wyandotte street which front upon the asphalt pavement constructed as aforesaid were in your opinion specially benefited and enhanced in value by reason of the construction of that pavement and if

332 so, state the extent of that benefit.

Complainant makes same objection as set out above in full.

A. They were, about ten dollars per front foot.

Q. Take the witness.

Cross-examination by Mr. FIELD:

Q. How long have you been in the real estate business, Mr. Woods?

A. About ten years.

Q. What has been the condition of the market here of real estate for the last ten years?

A. I consider that property has been slow sale and not bringing its value, everything considered.

Q. You think then that property, the prices for which it has been selling, have not been equal to its real value?

A. In most cases that is my opinion, yes sir.

Q. What is the reason of that?

A. Well that is a question that has been very hard for real estate men to answer.

Q. There does not seem to be as great a demand for it as in your opinion it deserves?

A. That is right.

Q. Haven't you got some notion of what the cause of the dull market for real estate is?

A. Oh, there are various causes, I do not know that we can really attribute to any special cause the slowness of real estate values. It is just simply that people are not in the real estate mood, I suppose.

Q. Well what is the condition of real estate generally in the city,—is it mortgaged or clear?

A. Well the real estate to-day is in better fix than it has been at any time in ten years past.

Q. Well what is the condition of it at this time?—isn't most of it mortgaged?

A. No, sir.

Q. Was there ever a condition of that kind here when most of it was mortgaged?

A. Yes, five or six years ago I expect fifty per cent. of the real estate in Kansas City was mortgaged.

333 Q. The mortgages have been foreclosed?

A. In the majority of cases the mortgages have been taken care of and in the last five or six years people have been a little better able to take care of their real estate and making a little more money, and quite a number of foreclosures have taken place.

Q. In the last two years?

A. Quite a number, but less, I think, than in the last five or six years in proportion.

Q. You say this action in real estate has been how long?

A. In the last two years there has been more or less improvement. There is no special activity or rush now but it is much better than two years ago.

Q. Well, it was practically dead until two years ago?

A. Well the market of course while it was not practically dead,

there was not anything like the real estate business that a town like Kansas City ought to have had.

Q. Well it is not now?

A. I do not think it is as good today as it ought to be but I can see it is improving right along in the last two years, particularly in the last year.

Q. Well would you go back of a year that the real estate improvement in values has been going on?

A. Well I would say in the last two years real estate has been inclined to improve.

Q. Throughout the city?

A. Yes, on nice property,—in certain sections of the town.

Q. That is as far back as I understand you go on the improvement of real estate, two years ago, within the past ten years?

A. Well, there are certain sections that the property has been increasing in the last three or four years,—it depends on the demand in that locality. Now take for instance the residence locality, that property where there are improvements or there is de-
334 mand where people wanted to go, that property has increased in value.

Q. You mean where the rich class of people have built nice houses that have improved the locality?

A. If you want to put it that way. That has improved the property and values.

Q. In aristocratic neighborhoods?

A. Yes, sir, prices are always better where the property is good.

Q. The people like to get in a rich neighborhood?

A. Yes, that seems to be the inclination of the people, to get where there are nice improvements. Take it in the Linwood district, the property has advanced fifteen or twenty per cent., and in the Hyde Park district property has improved and in the northeast end of town property in the last two years has improved quite a good deal, choice locations have been advancing steadily.

Q. Now where is the densest populated portion of Kansas City?

A. Well east as far as Prospect avenue east of Main street.

Q. How far south?

A. As far south as 41st or 42nd street. That is improved only to 41st or 42nd street.

Q. I am asking you for the most thickly settled portion of Kansas City?

A. Well the most thickly settled portion is within a certain radius, say Prospect avenue on the east and 32nd on the south and the Bluff on the west.

Q. And then do I understand you to say that the thickly settled portion of Kansas City was,—now the river is the north side of the town, isn't it?

A. Yes, sir.

Q. The streets begin with First street next to the river and go south with cross streets to these numbers that you have given.

A. Yes, sir, all of that territory Judge is pretty well built up.

Q. You mean from 32nd street north to the river?

A. Yes, sir.

Q. I will ask you if it is not a fact that the farther north
335 you get the more compactly built are the houses?

A. Well, you might say it was because it is the old part of the town,—of course it is different property altogether.

Q. Well, isn't it a fact, Mr. Woods, that the thickly built up portion of the residences in Kansas City is north of 15th street?

A. Well I would say north of Eighth street if you want to get in the old part of town.

Q. The houses are scattered until you get north of 15th street?

A. They are scattering until you get north of 30th or 29th street and then it is fairly well built up until you get to 39th or 40th street, with the exception of the property along about Mastin's.

Q. That is part of the Hyde Park district?

A. That is part of the Hyde Park district.

Q. Well that is not thickly settled?

A. It is all east of Main street and west of Main street it is simply the property has not been on the market for sale or it would have been just as thickly settled as on the east.

Q. Well west of Main street in the Hyde Park district that is not thickly settled?

A. Well that property has been built up in the last three years, that particular part of town has built up wonderfully fast in the last three years.

Q. Do you know how many houses have gone up on Main street from 31st to Westport avenue in the last three years?

A. I could count them up.

Q. Well count them up.

A. I think some fifteen or sixteen houses.

Q. On Main street from 31st street to Westport avenue,—now let us have them, give the locations and who owns them please.

A. Well sir there were,——

336 Q. Take from the north to the south or south to the north.

A. We will take the west side of the street first,—well there are three houses along in there put up by Mr. Slavens, between 31st and 32nd, then there is the Taylor house. Then comes a house, I don't know who built it, along there opposite or close to Conkling's house,—you remember there were three houses built about six years ago. There is a new one put in where those three were.

Q. There were five of them

A. Then there are two of them new houses.

Q. They were all built there before?

—. Then there are three houses, one on the corner and a new house just finished and Judge Ellison's that is three in the next block, and then there is a little house put up there right near your lot that is used for a flower garden a kind of conservatory, and then just beyond your lot in the same block there are two new buildings, one a store building and the other a little house.

Q. Is it a street car?

A. No, sir, then comes the street car house and lemonade stand.

Q. Now on the west side of the street you have given 13 and you gave two houses between 37th and 36th on the west side, are you clear that those two houses have been built in the last three years?

A. I am not perfectly clear, I could not swear that they have, but I think they have.

Q. Now you say in the block where my property is there is a green house there,—you mean a house where they raise flowers?

A. A little house put there.

Q. You think that is a special advantage to the street, do you?

A. I do not think it is any improvement to the street, no, sir.

Q. Now let's go in the block south of that on the west side, you say there are two stores there,—what kind of buildings are they?

A. One is a small store occupied as a tin store or something. They are small buildings.

337 Q. That is at the terminus?

A. Near it.

Q. It is just a step or ten or fifteen steps anyhow from the store building you are talking about?

A. Just a short distance.

Q. Is it frame?

A. Yes, sir.

Q. One of those placed there is a huckster stand in an old street car?

A. Yes, there is an old street car there.

Q. Those are the thirteen structures that you have named that have gone up out there? Now how many of those thirteen that have gone up there do you think are of any advantage to the street?

A. Well I do not think any of the improvements south of 38th street, buildings and improvements, are of any special advantage to that locality?

Q. Are they any advantage at all, general or special?

A. Well where you get on Main street at the end or terminus of the cable that is looked upon as being a little business point there and of course those houses were put up there on that account. I presume they just being ordinary frame buildings, that when the car line is extended that those buildings will give way and that will be used for nice residence property.

Q. Well that is a supposition?

A. Yes, sir.

Q. Now north of 38th street let us get the balance of these buildings on the west side. You have gone back three years. This pavement was not laid three years ago. Now north of 38th street how many of these buildings that you have spoken of have been put there since this pavement was laid?

A. North of 38th?

Q. Yes.

A. Well the improvements that I have mentioned have been put there since the street was paved. Now I do not remember whether

that was in 1897 or 1898, but those houses were put there since the street was paved, unless it might have been one house and
338 that is Judge Ellison's, but the others I know.

Q. How many of those houses besides Judge Ellison's,——

A. Judge Ellison's was completed in the last three years.

Q. Now the Taylor house was buil since the pavement?

A. Yes, sir.

Q. And the Slavens houses?

A. Yes and the two houses north of Judge Ellison's, and I am quite certain that Judge Ellison's,—I feel that way.

Q. Now do you mean to say to-day that with the houses you have named that the majority of the lots on the west side of Main street between the points you have been asked about are built on?

A. No, I do not undertake to say they are built on. I claim this, that those lots, of course, the majority of them have not been on the market, that is they have not been on the market at prices that would sell them.

Q. I don't want to argue with you Mr. Woods, but I will ask you the question with all the houses that are now on the west side of Main street are the majority of the lots on that side of Main street improved?

A. No, I do not consider that the majority of the lots are improved.

Q. Well the other proposition must be true, that the majority of them are now vacant and unimproved?

A. I could not say positively but as near as I can remember the larger part of the west side is unimproved as far as building is concerned.

Q. The Taylor house between 34th and 35th, that is the only house in the block?

A. Yes, sir.

Q. That block is about 900 feet long, is it not?

A. Well let's see,—that wouldn't miss it very far.

Q. Now down in the block where my property is which
339 Mr. Scarritt has interrogated you about, there is a block there of over 600 feet where there is nothing but a green house?

A. Yes, sir.

Q. Are you familiar with my property at 39th and Main fronting on the car barn?

A. Yes, sir.

Q. Fronts right on the car barn?

A. Yes, sir.

Q. You have given here an arbitrary estimate that the lots on Main street are benefited equally from one end to the other?

A. I said from eight to twelve dollars a front foot.

Q. Are equally benefited, all of them?

A. To the amount of their frontage.

Q. Do you mean the one on the car barn frontage is benefited as much as Mr. Taylor's is benefited?

A. Yes, I think the one fronting on the car barn is benefited as much as Mr. Taylor's lots.

Q. Is it worth as much money?

A. No, sir.

Q. It is not as good neighborhood?

A. No sir, it is not as good.

Q. There are no residences at all in that block, are there, 39th and Main?

A. I do not think there are.

Q. Now, Mr. Taylor's lot is a very high sightly lot, isn't it?

A. Yes, it is a nice lot.

Q. It is close to the Armour property on 35th street?

A. Yes, and close to the Mastin property.

Q. The Armour property a block or two east of that on 35th street is the highest property in that district, isn't it?

A. I do not know that the Armour property is any higher property that Mr. Taylor's just about the same elevation.

Q. Mr. Taylor's fine house is at 35th and Main and Mr. Mastin's fine property is right across the street?

A. Yes, sir.

Q. That is in what is regarded as one of the select neigh-
340 borhoods of the town?

A. It is regarded as being a good location.

Q. Would you think if a man wanted to move in the class of Mastin's and Armour's and Taylor's *be* would go down there to 38th and Main street and buy a lot and build a fine house?

A. I think if a man was going to build a house along the order of Taylor's or Armour's he would be very apt to select a lot that would cost him from $75.00 to $100.00 a foot instead of one costing $45.00 or $50.00.

Q. You do not think my lots are worth as much as the Taylor property?

A. No, sir.

Q. Yet you think it is benefited as much as the Taylor property?

A. Yes, sir.

Q. How do you figure that out?

A. Your lot is quite a little ways beyond the Taylor property and my opinion is that if that street was not paved your lot instead of being estimated worth forty-five to fifty dollars a foot, that you could not get to exceed thirty dollars a foot because yours with the unimproved street would not sell where Taylor's lot would with the unimproved street. His is a nicer lot that yours.

Q. Do you know of any lots selling in there recently near my property?

A. I sold the corner of 38th and Warwick, the McCord property.

Q. I say do you know of any property on Main street near my property selling recently?

A. Now I haven't sold anything myself. I heard there was a lot north of you,——

Q. I do not want to hear what you heard, I want to know what you know?

A. I have not sold anything myself right near your lot.

Q. This Warwick boulevard is two blocks east of Main street?

A. Yes, sir.

341 Q. And it is a street that has been improved for eight or ten years is it not?

A. Not that long.

Q. How long has it had this asphalt pavement?

—. About seven years.

Q. Isn't that one of the nice streets out there?

A. It is considered one of the nice streets.

Q. Have you made any sales on Baltimore avenue of property out in this vicinity?

A. Yes, two blocks north of it.

Q. Two blocks north of what?

A. On 39th street.

Q. Well who did you sell to?

A. Sold a lot to Mrs. Machette.

Q. Do you know what lots on Baltimore avenue sold for in 1897 before this pavement was put on there?

A. Yes, ground that I sold for thirty dollars a foot three months ago was offered before the pavement was put in for $22.00 and not sold. I had it for sale.

Q. Was the market poorer then than it was three months ago?

A. I think the market was a little better three months ago.

Q. When was that?

A. It was just a little while before the street was paved. I think it has been paved a little over two years. It was offered for twenty-two dollars and afterwards sold, before the pavement for twenty but I did not sell it, and I sold it after the pavement for thirty.

Q. Do you know the circumstances under which it was sold?

A. I had it for sale for twenty-two dollars.

Q. Was there a mortgage against it?

A. At that time I do not know. It was not listed with us as being mortgaged.

Q. You do not say it was or was not mortgaged?

A. No, sir.

Q. At that time you say the market was not as good as it was three months ago?

A. No, sir.

Q. Or as it is to-day?

A. No, sir.

342 Q. Do you — whether Mastins have sold property down there twenty two dollars a foot since these pavements were put down?

A. No, sir.

Q. Do you know the property that Bonfils bought out there at 36th street and Baltimore avenue?

A. I do not know,—I heard he bought some.

Q. He bought it for $22.00 a foot, didn't he?
A. I understood he bought it very low.
Q. That was since the pavement?
A. I had nothing to do with the deal.
Q. It probably was not mortgaged when it was sold for thirty dollars a foot?
A. Yes, sir, it was and the mortgage was paid off by this lady who bought it and she has built a house now, it is just under roof.
Q. There has been some testimony here about some houses built by Finlay between 37th and 38th streets on Baltimore avenue.
A. Yes I understand.
Q. Those houses were built for sale I understand,—do you think that building a neighborhood up in that way is calculated to enhance the property, building houses for sale?
A. Well Finlay has put up a very fair looking house for that value of ground,—$35.00 to $40.00 a foot.
Q. Suppose he didn't pay but $27.00 a foot?
A. Well his houses are all the better for that price ground.
Q. What do you think that ground was worth between 37th and 38th on Baltimore before this pavement was put down?
A. It was worth twenty-five dollars a foot.
Q. If Mr. Finlay only paid $27.00 a foot after it was paved the owner of the property did not get the benefit of the pavement you have testified to?
A. Well that may be,—maybe he didn't get the worth of the property.
343 Q. Do you believe Mr. Finlay would have ever built those houses on the installment plan for sale if the street would not have been paved?
A. I do not think he could afford to build those houses on an unimproved street.
Q. So you think the paving of Baltimore avenue was the cause of the building of the Finlay houses on the installment plan?
A. I would not say that was the cause of it, but I say the street improvements that have been put there in the last three years have been the cause of that property selling at all. Now take that property it is nice property and the demand to-day is for an improved street and the street unless it is improved, you might just as well talk to the wind,——
Q. There is a fine cable out there, isn't there?
A. As to try to sell a man a house.
Q. Suppose you had vacant property there and were holding it for high class property for the future,—you think the town is going to be better than it is now,—don't you think that territory out there has some prospect to it?
A. Yes, sir.
Q. Take my property there and you had been carrying it ten or twelve years through all the dull market wouldn't you rather have that street pavement not laid there than to have the street paved and hasten the improvements, wouldn't you rather wait until the

people are ready and able to do that with a better class of improvements?

A. Well that depends.

Q. Would you want to buy a house built in that way to live in yourself?

A. Well it would depend on the money I had to pay down on it. If you or Mr. Scarritt or I was building a home we probably would build it a little different.

Q. If you wanted to build yourself a home would you hunt
344 a locality that had been built up for purposes of sale or would you hunt an established locality where there are good substantial citizens who own their own homes?

A. Well circumstances alter cases. I think in that locality people have built houses for homes. There are places in town where Finlay and others have built houses that I would not like to build in.

Q. Suppose you owned this property Mr. Scarritt has asked about on Baltimore and Wyandotte, would you buy it since Finlay has put up those installment houses there quicker than you would if he had not built them there?

A. I do not think that that would change my feeling about the location with the houses that he has there now. If there are not any poorer houses built there I do not think those houses are calculated to injure your lots and I do not think it would interfere with my buying to build a nice class house there.

Q. Don't you think it would be better to get a neighborhood where people have built their own houses?

A. I do not think that would cut much figure in that property out there.

Q. Have you got much real estate in Kansas City,

A. No, sir.

Q. You used to have a good deal?

A. Yes, sir.

Q. Lost it all?

A. Lost a good deal of it.

Q Mortgaged it and lost it?

A. Yes, sir.

Q. Now what would you do with my property out there?—would you hold it for the future or sell it and pay the tax bills?

Counsel for defendant object to the question as incompetent, irrelevant and immaterial.

A. I believe that you can sell that property on to-day's market and reinvest your money in probably some other parts of town that eventually you would make more money out of it than to carry unimproved vacant property.

345 Q. Well you thought that once yourself, didn't you Mr. Wood?

By Mr. SCARRITT: You need not answer those personal questions.

By Mr. FIELD: I want you to answer it. I want an answer to that.

By Mr. SCARRITT: If it is not an insult.

By Mr. FIELD:

Q. Now what would you put on this property I have out there that would bring in an income?

A. Why I would put houses that would rent for forty and forty-five dollars a month and some of that property would rent for fifty dollars a month with an ordinary sized house.

Q. How many feet of ground would you take?

A. I would take forty to fifty feet to a house.

Q. That is a lot to a house?

A. Yes, sir.

Q. Which street would that be on?

A. Baltimore or Wyandotte either one.

Q. How much do you think that property on Wyandotte street of mine is worth?

A. On Wyandotte street your property is worth $37.50 a front foot.

Q. Now a fifty foot lot at $37.50?

A. It would be $1750.

Q. Then the lot would be $1750?

A. Yes, sir.

Q. Now how many room houses would you build on a place like that?

A. I would build an eight room house.

Q. How much would that cost?

A. Cost $3500 or $4250.

Q. How much would that $3500 if I wanted to borrow it cost me?

A. Cost you six per cent.

Q. Well that would be $210 a year?

A. Yes.

Q. How long a time could I borrow that for?

A. Five years.

346 Q. That would cost me a commission I suppose to get it?

A. It depends entirely on circumstances. If you get it through an agent it would cost you a commission, yes.

Q. Could I borrow $3500 and get the money in my own hands to put the houses there?

A. No, you could not.

Q. I could not borrow the money then and get the money in my own hands to handle it and pay out?

A. An ordinary man could not. You might be able to. An ordinary man could not.

Q. How much rent will that eight room house bring out there? Mr. Woods?

A. That house will bring you forty-five dollars a month rent.

Q. An eight room house?

A. Yes, sir it will.

Q. Aren't you mistaken about that?
A. No, sir I am not.
Q. It costs carefare to get there?
A. That is all right, it is a pleasant location and it is a neighbo hood where there is a demand for houses, $540 a year.
Q. $210 interest,—that would leave $330?
A. Now you understand Judge I am figuring that that is to be modern house, water, gas, sewer, and all street improvements in. am taking into consideration that these improvements are all mad
Q. You cannot build a house for $3500 that has got all these in provements?
A. Yes, sir, I can.
Q. Do you know of an eight room house in that neighborhoo that rents for that amount?
A. I know that is what Mr. Slavens expects to get for the hous he is building.
Q. Do you know of a house renting for that out there?
A. There are very few houses renting out there, it is an ownershi neighborhood.
Q. I am mortgaging the lot in which I have $1750 an
347 giving my note personally for $3500?
A. Yes, sir.
Q. And I have the annoyance of building and the mechanic liens?
A. Yes, sir, and you build that house and bring it into the offi and I will sell it for you for $5500.
Q. And I have to sign a note for $3500 that runs for five years
A. Yes, sir,—don't take my advice because I have had such ba luck.
Q. You figure lot and all at $4250?
A. That would be $5250.
Q. And at the end of the five years, suppose a tenant is the every month?
A. They would be. That is good property, you can count o that.
Q. Now and then you lose a month's rent out of the bon to people?
A. I think like this, that if I had had a house on that propert the other day I could have renter it to Herman Schmelzer for thre years at $45 a month like a top.
Q. Now out of this $540 I have to pay city, State and count taxes,—what would my tax be a year?
A. Your tax would be somewhere near about $35 for the cit State and county.
W. $35 for both?
A. Yes, sir, city, State and county.
Q. You know better than that, the vacant lot to-day I pay mo taxes than that on.
A. On a fifty foot vacant lot?
Q. Yes.

A. Then they are robbing you. I do not believe I would miss that $2.50 with that improvement on it.

Q. Don't you know we pay one per cent. to the city on the assessed valuation and one per cent. to the State and county both? What do you suppose the assessment would be they would make on that property,—they would probably value that property at $1750.

348 By Mr. SCARRITT: They would not put that property in over $600 the fifty foot lot.

By Mr. FIELD:

Q. Now then anyhow you concede this, that I am under a mortgage,—now when the five years is up will a prudent loan man extend the loan?

A. Well you are asking me questions about five years hence and I cannot prophecy that far. It is something like a man who came in the other day and asked me about a lot on the boulevard and I said sixty dollars a foot and he asked me what I thought it would be worth in five years from now, and the next day he went to the agent he had been figuring with for about thirty days and bought it at the price I said sixty dollars a foot, and he is counting on some advance on that.

Q. How do you value the land?

A. You can go out there and borrow sixty per cent. of the value of your property as it stands, your lot and improvements.

Q. Do you mean they will lend you the full value of it?

A. They will lend you sixty per cent. of the full value. That would be pretty near a ten per cent. investment.

Q. I don't want to get under it just the same. Now you say I can borrow sixty per cent. of the value of the lot and improvements?

A. Yes, sir.

Q. You figure if I made the improvements you suggest on Baltimore avenue, I would have the value of my lot at the amount you say they are worth, and the improvements at a cost of $5200,—now what would sixty per cent of that be?

A. About thirty-one or thirty-two hundred dollars.

Q. 3120.00 wouldn't it be?

A. Yes, sir.

349 Q. How would I get the balance? It would be nearly $400 short, wouldn't I?

A. You would have to go down here to Sexton or some of those fellows and make a second loan. They would make it for you and charge you eight per cent. and ten for commission.

Q. That is about the usual fix a man gets into?

A. No, sir, not ordinarily. A man like you starting in with a lot like that and building a house you would likely have the money to complete it.

Q. Now if you haven't got the money to improve it would not the sensible thing be to sell it for what you could get?

A. No, sir that is not my experience. I think real estate is all

right and I think this, I think if I owned that ground of yours out there I would either sell it or else I would improve it.

Q. You would mortgage it?

A. If I had to mortgage it to improve it I would do it because you could sell the house and get rid of the mortgage.

Q. Suppose the fellow is not good that assumes the mortgage?

A. He is supposed to pay you something down on it and if you build a pretty fair house on it,——

Q. You are supposed to think about the note after you sign it?

A. Certainly, it is your note until he pays it.

Q. Then it is still my obligation?

A. Wouldn't you be glad to take the property back at $3500 when you sold it for $5500? If you will put up the kind of a house I suggest I can sell it for you.

Q. I have thought of this matter a great deal and I do not propose to take any more worries. Have you been out to look at my property recently?

A. I am out there every few days.

Q. Have you been out there within a day or two?

A. I was out there a day or two ago looking at that house I put some insurance on and that was two blocks this side and I
350 drove clear down to 40th street and around in there, all through there.

Q. What did *to* go there for?

A. To look up some property I got an offer on some ground not very far from there.

Q. When were you first spoken to on the subject of being a witness in this case?

A. Mr. Griffith came over to the office yesterday to see me and I would have been here yesterday afternoon but I got busy and forgot all about it.

Q. Were you subpœnaed?

A. No, sir.

Q. Are you connected with Mr. Scarritt in any way in business?

A. No, sir.

Q. You say you frequently testify in these cases involving values?

A. Oh, not in these. I only testified in one paving suit before.

Q. Which suit was that?

A. That was a suit for Forest Avenue paving.

Q. Were you a witness for the defendant, The Barber Asphalt Company in that case?

A. Yes, sir.

Q. Do you give up all this time to them for nothing, Mr. Woods?

A. The Barber Asphalt Company and everybody else that I testify — usually pay me for my services. I appraised some property yesterday for Judge Guinotte in the probate court and I got paid for it.

Q. That was as an appraiser?

A. Yes, sir.

Q. The law provides for what you shall be paid?

—. Yes, sir. Judge Guinotte has called upon me two or three times of late.

Q. Is it the practice of real estate men here in this town to do that?

A. Generally. I could give my whole time to it Judge if I followed it up.

Re-direct examination by Mr. SCARRITT:

Q. Judge Field referred to the fact that Warwick boulevard
351 was quite extensively improved and a fashionable residence district,—where does that street lay with reference to that part of Main, Baltimore and Wyandotte that we have referred to in this examination

A. Just two blocks east of Main street.

Q. Parallel with Main?

A. Parallel with Main.

Q. Now is the elevation of that street, generally speaking, as high or is the grade as good as that either of Main, Baltimore avenue or Wyandotte street?

Complainant objects to the question as immaterial.

A. I do not think the grade is near so good as either of those three streets.

Q. What then would you say was the cause of the more advanced improvement on that street than on the three streets I have named?

Complainant objects to the question as immaterial.

Q. I believe you stated that it was paved about seven or eight years ago with asphalt?

A. I think the street built up before the other streets did because it had the street improvements. I think that is really the true cause.

Q. What do you mean by the street improved?

Complainant objects to the question as immaterial.

A. Well the street paving, curbing and sidewalks.

Q. That is all.

Re-cross examination by Mr. FIELD:

Q. Mr. Wood what do you think property on Baltimore avenue is worth on the east side of Baltimore avenue is worth to-day?

A. In the neighborhood of $37.50 a foot.

Q. Do you know lots eight, nine and ten north of the Baptist church,—do you know what that *time* is worth?

A. That is worth about thirty-five to thirty-seven and a half a foot.

Q. And that has recently had a granitoid sidewalk put
352 down, has not it?

A. I do not remember.

Q. And granitoid curbing?

A. There is a curb.

Q. So that in addition to the cost of the asphalt that lot has the cost of the granitoid sidewalk and granitoid curbing?

A. Yes, sir.

Q. You think $35 to $37.50?

A. $35 to $37.50.

Q. Would that be the limit?

A. Well right around you there, the opposite corner they are asking forty-five dollars.

Q. Whose corner?

A. I have forgotten the man's name.

Q. Mastin's own that corner?

A. I do not know who owned it.

Q. You must be mistaken about any corner being offered in there?

A. Thirty-ninth and Wyandotte.

Q. That sold recently at $32.50.

A. It is held at $45.

Q. Now don't you know that was sold at $32.50 since this pavement?

A. I say they were holding that lot at $45 a foot some six months ago.

Q. But sold it for thirty-two and a half?

A. Yes, sir.

Q. Aren't you mistaken in thinking he ever asked that much?

A. I do not think I am.

Q. What would you say when I say I sold in 1890 the Baptist church lots for $55 before any pavement was put down?

A. Certainly?

Q. Would you think property was worth anything without pavements?

A. That was when we were all wild. I can show you property at Ninth and Lydia that sold for $200 a foot that you could not get forty for to-day or fifty.

Q. The street railway has come out there since?

A. That was just being built when you sold your property.

Q. We had no boom here in 1889 or 1890.

A. 1889 was pretty good real estate times.

Q. People hadn't quite been choked to death at that time had they?

A. Not quite.

353 Q. The mortgages were foreclosing?

A. Well some before that.

Q. Do you know Mr. Mastin sold property at forty and forty-five dollars a foot?

A. I do not know.

Q. Your testimony is a mere opinion of yours,—you have no actual knowledge of sales just before or after these pavements?

A. My testimony is based on every day occurrences, and what I,——

Q. Well you admit,——

A. And what information I claim to have as a real estate man of ten year's experience.

Q. You admit that up to two years ago the market here was practically dead, don't you?

A. I say that there was not much real estate business.

Q. This demand that you talk about for real estate now within a year or two past has been general in the city?

A. In good localities, yes sir.

Q. That is all.

WM. S. WOODS.

Sworn to before me on the day within the hours at the place in that behalf first aforesaid and subscribed in my presence this 20th day of June, A. D. 1900.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Mo.

Not being able to complete the taking of these depositions on this day on account of the absence of other witnesses whose testimony the defendant is desirous of taking, by and with the consent of the parties complainant and defendant to this action, I adjourn the further taking thereof until to-morrow then to be resumed at the same place and within the same hours mentioned in the annaxed notice and in the caption hereof.

Given under my hand and notarial seal this the 13th day of April, 1900.

354 [SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Mo.

Pursuant to adjournment as above stated on this the 14th day of April, 1900, at the same place mentioned in the caption hereof and within the same hours, counsel for complainant and defendant being present, I resumed the taking of these depositions as follows:

Mr. Charles E. Small appeared for complainant.

E. R. CRUTCHER, of lawful age, being produced, sworn and examined on the part of the defendant deposeth and saith as follows:

Direct-examination by Mr. SCARRITT:

Q. Please state your name, place of residence and occupation.

A. E. R. Crutcher, Kansas City, Missouri. Real estate and fire insurance.

Q. How long have you been engaged in the business of buying and selling real estate in Kansas City?

A. Nine years.

Q. With what firm are you connected?

A. Crutcher & Welsh.

Q. Do you handle a great deal of real property in this vicinity or not?

A. Yes.

Q. What portion of the city do you reside in?

A. 35th and Troost.

Q. That is in the southern part of the city?

A. Southern part of the city.

—. Are you familiar with the real property fronting on Main street from 31st street to Westport avenue and on Baltimore avenue and Wyandotte street between Hunter avenue and Westport avenue in this city?

A. I am.

Q. Are you familiar with the property of complainant in this suit, which is described in the tax bills referred to in the bill
355 of complaint fronting on those three streets?

A. I am in a general way.

Q. Does it come within the line of your business to know the effects of the construction of asphalt pavements along streets, upon the lots of land abutting thereon, as to market values?

A. Yes.

Q. Will you state whether or not in your opinion the lots of the complainant Field fronting on Main street and abutting on the asphalt pavement constructed as alleged in the bill of complaint in the fall of 1897 in front of his lots, were specially benefited and enhanced in value by reason of the construction of that pavement?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. I think it was.

Q. To what extent?

(Same objection by complainant.)

A. I consider the minimum enhancement ten dollars per front foot considering the cost of the improvements in that estimate.

Q. State whether or not in your opinion all of the lots abutting on the said asphalt pavement were specially benefited and enhanced in value by reason of the construction of that pavement?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. I think so, I think they were.

Q. To what extent?

(Same objection by complainant.)

A. A minimum benefit of ten dollars per front foot considering the cost of the improvements in the estimate.

Q. State whether or not in your opinion the market value of all of the lots abutting upon said improvements, including the complainant's lots, was increased by reason of the construction of this pavement, and if so to what extent?

A. I think that the market value of every lot on Main
356 street, Baltimore and Wyandotte between 33rd and Westport avenue had the market value increased by at least ten dollars per front foot because of this paving.

Q. In what ratio would you say, speaking with your experience and business knowledge was the total special benefit which was sustained by all of the lots abutting on Main street sustained by the individual lots?

Counsel for the complainant objects to the question as incompetent, irrelevant and immaterial.

A. I think that the benefits to each lot,—I think the ratio of benefit to each of the lots is the same in proportion to the number of front feet frontage.

Q. Would you say that the same rule would apply as to the distribution of special benefits upon Baltimore avenue and Wyandotte street?

A. Yes.

Q. State whether or not in your opinion the lots of complainant Field described in the complaint, which front upon Baltimore avenue were specially benefited and enhanced in value by reason of the construction of the asphalt pavement on that street in front of the said lots as described in the bill of complaint?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. I think they were.

Q. To what extent?

(Same objection by complainant.)

A. A minimum benefit of ten dollars per front foot, considering the cost of the improvements in this estimate.

Q. Are you familiar with the complainant's lots described in the bill, which front on Wyandotte street?

A. Yes in a general way.

357 Q. Give your opinion as to whether or not those lots were specially benefited and enhanced in value by reason of the construction of the asphalt pavement on Wyandotte street in front of those lots in 1897, as alleged in the bill of complaint?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. I think they were.

Q. And to what extent?

(Same objection by complainant.)

A. A minimum benefit of forty dollars per front foot, the cost of the improvements being considered in this estimate.

Q. Take the witness.

Cross-examination by Mr. C. E. SMALL:

Q. Where are Judge Field's lots on Main street located that you have spoken of?

A. I am informed *he* owns the southwest corner of,—I can tell

on the map. (Producing map.) Southwest corner of 38th and Main.

Q. It is not right on the corner, is it?

A. I claim no absolute knowledge of the location.

Q. When was this pavement laid for which these tax bills were issued?

A. I do not remember.

By Mr. SCARRITT: It was in the fall of 1897.

By Mr. SMALL: All of them on all of the streets?

By Mr. SCARRITT: Yes.

By Mr. SMALL:

Q. What were the lots worth just before the street improve-
358 ments were made, without reference to the pavements?

A. I could only state that values in this immediate vicinity have fluctuated considerably in the last three or four years on account of special local reasons and I could not state definitely what those lots could be sold at at any particular time.

Q. Well you have undertaken to say they were increased in value ten dollars per foot?

A. I mean by that if lots were worth fifty dollars at any particular date they were increased to sixty dollars but if those lots should become depreciated to thirty dollars a foot they would be worth ten dollars more with the pavement than without it.

Q. So no matter whether the price of the lots was up or down you think the pavement increased the price?

A. I am of the opinion that the paved streets are worth ten dollars a foot more than the unpaved.

Q. I want to get the facts, not suppositions.

A. I am claiming to give my opinion of comparative values of property on paved and unpaved streets. We have sold for others and purchased on our own account properties west, east and north of this property of Judge Field's and from our experience we know that fluctuations have been considerable, as I stated a moment ago.

Q. I would like to ask you again what Judge Field's property on Wyandotte street was worth just before it was paved?

A. Wyandotte and Thirty-eighth?

Q. Yes.

A. I cannot answer that question definitely three years ago.

Q. Well was it worth thirty dollars a foot?

A. Somewhere around twenty-five to thirty dollars.

Q. What was his property fronting on Baltimore avenue worth?

A. About the same price.

359 Q. Now did not you buy a lot of property of the Mastin estate on one of those streets, Baltimore avenue or Wyandotte street?

A. I am interested in a company that did.

Q. Where was the property your company bought?

A. Between 33rd and 35th on Baltimore.

Q. How many feet did you buy?
A. On that stretch we purchased 1100 feet I believe.
Q. Now what price did you pay per front foot?
A. We purchased that property subject to outstanding special tax bills for sewers, paving and curbing,—it was purchased in connection with other property on Warwick boulevard and a lump sum was paid for the entire batch of lots. They cost us about $28 per front foot.
Q. Twenty-eight dollars?—well when was that purchase made?
A. It was made two years ago this month I believe.
Q. That was after this pavement was laid and all the sidewalks were in and everything?
A. Yes.
Q. Isn't it a fact that notwithstanding the pavement property along the line of it has steadily decreased in value, that is you could not get as much after as before?
A. In answer to that question I would state that in an answer given a moment or two ago I spoke of the fluctuations caused by local conditions. One of those local conditions has been the state of the finances of the Mastin estate. We purchased the property referred to from this estate at a time when they were forced to raise thirty thousand dollars to save the estate from foreclosure or sale under some encumbrances, and when the Mastin estate was in funds that property was held for ten or fifteen dollars a foot more than it was when these occasional large payments fell due.
360 Q. Well isn't it a fact that such local conditions or similar local conditions have prevailed in Kansas City generally to such an extent for a number of years last past that real estate notwithstanding all the improvements you could make by way of sewers, sidewalks and pavements has decreased in its price?
A. That is not true in my opinion generally. It is true in particular localities.
Q. Well in this particular locality it was true that this local condition was there?
A. It was true so far as the large holdings of the Mastin estate were concerned and of course this had its effect on other property.
Q. Because people would not pay a higher price for the adjoining property than they could buy similar property for from the Mastin estate?
A. Not unless some special reason prompted them.
Q. You have spoken regarding local conditions in that neighborhood,—I will ask you whether that neighborhood there in Westport along the line of the cable has not built up more than any other part of Kansas City in the last four years?
A. I think it holds its own with any of them.
Q. And notwithstanding that the price of the land has been going down?
A. That is not true as a general proposition.
Q. Well you cannot say that it has increased?
A. It has in certain localities.

Q. I am talking about generally.

A. Property at 35th street and Warwick boulevard, between 37th and 35th, has increased in value within that period.

Q. Between Thirty-seventh and Thirty-fifth?

A. Yes. Property which we sold at forty dollars a foot on the corner of 36th and Warwick three years ago has since been sold as high as sixty-five dollars a foot. I made the sale. Property on 35th street has sold at from five to fifteen dollars a foot over
361 what it would have realized several years ago, because of projected street improvements.

Q. Well do you know of several sales by the Kenwood Land Company in the last several years, one to Mr. Siegel and one to Mrs. Mason?

A. Yes, we made the sale to Siegel and knew of the sale to Mrs. Mason.

Q. Now do you know what that property brought per front foot on the side street, 35th and Holmes and 35th and Kenwood?

A. My recollection is that Siegel paid forty dollars a front foot on the Holmes Street side.

Q. And Mrs. Mason?

A. I do not know. I did know but I have forgotten. We sold also to Mr. Eyssell and I think he paid $42.50 for his Holmes Street frontage. I made that sale personally and his only reason for buying it was the prospect of getting a paved street I assured him he would have.

Q. Well he did not have any paved street and he hasn't any now?

A. No, sir.

Q. And he bought it without the pavement?

A. Yes, sir.

Q. And it is away off from the street car, six or seven blocks away from any street car?

A. Yes, sir.

Q. And yet that property sold for a good deal more than this property of Judge Field's with the pavement on it?

A. It is better property,—in his opinion it is better property.

Q. Isn't it a fact that there has been an extraordinary amount of asphalt pavement laid in Kansas City in the last five years?

A. Yes.

Q. Isn't it a fact also that this enormous amount of pave-
362 ment has thrown on the market an enormous amount of vacant property?

A. Yes.

Q. And that this has had a tendency to keep the price of property down on paved streets as well as all other property?

A. On paved streets our observation has been,—on Prospect where we have sold property on our own account, on Olive and on Park, that values have increased and sales have been stimulated by reason of the pavement while property on side streets unpaved has remained unsalable.

Q. Well isn't it true that property on paved streets is a drug on the market there is so much of it?

A. It is true that there is no activity in real estate now but we do not attribute it to the number of paved streets.

Q. Well does not that force people to put their property on the market by reason of tax bills and force local conditions such as you say exist in regard to the Mastin estate?

A. I can give you my experience in the payment of taxes for a large number of clients. We have had property forced on the market by non-residents because of special tax bills by reason of parks, sewers and other improvements that are not adjacent, not contiguous to the property. Their objection is their property is non-productive and they pay for paving streets and general benefits and have nothing from the property but we haven't a single case where property is thrown on the market because of improvements directly affecting it, that is street pavements. I can cite one man, a Cincinnati man, who has been at us repeatedly to sell his property and his grading and paving and sewer bills all came on the property, and we are now about to sell the property for more than the total cost of all these tax bills added to the original selling price he offered it for.

Q. Now in regard to the Mastin estate, isn't it a fact they
363 got into this condition and had to sacrifice their property because of special tax bills?

A. Well I can't testify as to that. We all have our own opinions.

Q. Well what is your opinion about that? They are about to be improved out of house and home?

A. The Mastins I do not believe could have realized as readily on their holdings without these improvements as with them. Now we sold to Bob Taylor at 35th and Holmes and he would not have considered it without the improvements.

Q. He was considering property *and* 36th and Holmes without improvements?

A. Yes, but his better judgment prevailed.

Q. At pretty near the same price?

A. No, sir.

Q. A difference of ten dollars per front foot?

A. It was $20.

Q. Now take that lot that Mr. Taylor bought, that was a corner lot?

A. Yes.

Q. The northwest corner of 35th and Main?

— Yes, sir.

Q. A pavement on both streets and it sold for how much per front foot on Main street?

A. Sixty dollars.

Q. How much did that pavement cost?

A. To make the situation clear on this particular piece of property,—Mr. Taylor knew that the pavement on 35th street was of no

value to him except as a temporary expedient and he would have to pay again for the boulevard construction.

Q. There is asphalt pavement there?

A. There is, but it adds no permanent value to that property. The Main Street frontage is the only one good.

Q. Now in your estimate of the advantages to Judge Field's property from this pavement you cannot give any tangible statement to show, or any tangible facts to show, that it was really increased in market value, that is that he could sell it for any more after the pavement was laid then before, can you?

364 A. I can state from my experience and observation that property under normal conditions is always more easily marketed and will always command an increased price over and above cost of improvements unless something unusual comes up to unsettle the value of property.

Q. Well what would you say was the value of a fifty foot lot fronting on 12th and Prospect before Prospect was paved and before 12th was paved with asphalt and granitoid sidewalks were put down on it, and after?

A. I will answer that that particular piece of property is another instance of unusual local conditions and no one can fix the value of any particular lot three years ago or to-day and I do not pretend to be able to say what was the value of any lot at any particular time for the reason that as a real estate agent I have seen properties sold at one price one day adjoining properties sold at a difference of 25 per cent. one way or the other next day. We have seen owners change their figures fully fifty per cent. in a month, and for that reason we do not pretend to have absolute knowledge of values. We can only state conditions as they come to us.

Q. Well was that lot worth $35 or $40 per front foot more after the pavements were laid in front of it than before?

A. No.

Q. Well you know what the cost of paving with asphalt is and what the cost of granitoid sidewalks is and what the cost of curbing is,—now just take that lot fifty feet front on 12th street and 125 feet deep on Prospect avenue paved, curbed and with a five foot sidewalk and see what the expense was.

A. 50 by 125?

Q. That would be 175 feet,—would you say that that was worth $25 a foot more after the improvements than before?

A. Yes, I consider that corner lot is worth $25 a foot more than before it was paved.

365 Q. That it would sell for it?

A. I am talking about the worth. It might sell very low.

Q. I am talking about the physical facts, the market value. Would not that property have sold for fifty dollars a foot, this corner lot, before the paving of either street?

A. Not in recent years.

Q. Would it not have sold for forty dollars?

A. No.

Q. Thirty?
A. No.
Q. Twenty-five?
A. Yes, sir. That is just about what it would bring.
Q. And it would bring fifty afterwards?
A. Yes, sir.
Q. Now don't you think it was worth fifty dollars before and it isn't worth any more now and fifty dollars is about right?
A. No.
Q. You did not know that that corner is worth more and has been for the last four or five years than the corner of 12th and Bellefountaine?
A. Yes.
Q. You do not know that Mr. Holmes before there was any asphalt pavement on 12th street, that Mr. Holmes sold the corner of 12th and Bellefontaine at fifty dollars a foot?
A. If I knew it I have forgotten it.
Q. Property has not gone up any?
A. It is held at $50 now.
Q. After the pavement it was held for fifty and it was held for fifty before?
A. I do not know.
Q. Wouldn't that be a demonstration that the pavement did not increase the value of property?
A. No, sir, I do not think it would because I can pick out cases ten to your one that will prove the reverse. I bought a piece of ground at ten dollars a foot out south two years and a half
366 ago, they put it in the street,—water, gas at a total cost of $2.50 per front foot and I sold that property readily at $25 per foot.
Q. Well did the pavement and improvements you made make any increase, do you think?
A. I think it sold better.
Q. Did that cause an increase?
A. Yes.
Q. How much in advance did you sell your Baltimore Avenue property for that you bought from Mastin?
A. I have not sold it.
Q. You sold a great deal of it.
A. No, I am sorry to say we have not.
Q. You certainly sold some I know of.
A. We sold 100 feet of it.
Q. At an advance of how much?
A. It is impossible to answer that by reason of the improvement of a portion of the property.
Q. You have to pay for your improvements and in addition to that you got $40 a foot?
A. It has been estimated at that.
Q. That was after you bought, and sold after the improvements were made?

A. There was no sale, that is simply an estimation of forty dollars a foot.

Q. You built a house and charged the cost price of the house in addition to the land at $40 a foot?

A. No, we built the houses under certain plans and specifications at a fixed price. One price was named for the improved property, seven thousand dollars.

Q. I understood the house went in at cost and the lot at $40 a foot?

A. Well we might have sold the land at cost and made a profit on the house. We did not make as much as the difference between the cost of that lot and forty dollars, I can tell you that.

Q. Well don't you think that this immense amount of asphalt pavement and other public improvements in Kansay City is acting as a sort of boomarang, it has thrown so much property on the market and created so many special conditions bearing down
367 on the value of property that the sum total of it all is that it has really decreased the market value or been an element in decreasing it.

A. I do not think that. On the contrary I think the reverse is true. But for the extensive pavement, asphalt pavement in particular, that has been done, this town would not have been built up to the degree it has been. There has been a practical demonstration of that on several streets, not only have new buildings been constructed but old ones have been improved and brushed up as the direct result of asphalt pavement.

Q. Well if there is a building of houses in a neighborhood you would think it would generally have a tendency to increase the value of vacant property?

A. Yes, generally.

Q. There has been a great deal of building out in the neighborhood of Judge Field's property in the south part of town in the last three years?

A. Yes, sir.

Q. Well would you say that the price of vacant property in that part of town where all these houses have been built has increased in the last three years?

A. As a general proposition I cannot say it has.

Q. Is not the price of real estate just like the price of anything else, regulated by the demand and the supply?

A. I have wasted so much brain trying to figure that thing out in the last few years I will not pretend to answer.

Q. Well do you say it is or is not?

A. I say the present condition of the real estate market is a mystery to those conversant with the condition of it.

Q. I would think that increasing the supply so enormously as to all these street improvements that have been made in the last three or four years would have a tendency to glut the market with real estate and depress the price,—now what do you think about
368 that?

A. As I answered a while ago it has the tendency of building up the streets that are paved and depressing those that are unpaved.

Q. Well doesn't it depress those that are paved too by increasing the supply?

A. It has a retroactive effect on them. There has been an advance on Prospect avenue from 24th street south of fully ten dollars a foot in the last year.

By Mr. SCARRITT:

Q. Is that on account of the asphalt pavement?

A. We figure it that way, we own property there.

By Mr. SMALL:

Q. Well there has been an advance in other parts of the city where there has been no improvement at all, hasn't there, in spots?

A. In spots.

Q. So you cannot attribute the advance to improvements in any particular case even where there has been an advance?

A. I can only judge causes by effects and in the majority of cases our observation has been that the paving of streets makes it more salable at higher prices.

Q. But in this case of Judge Field's on account of the Mastin estate having such a large amount of ground there and being forced to sell it why this pavement did not increase the market value of the ground?

A. The effect would have been the same with or without the paving. The depression would have been felt probably in a greater degree if there had been no paving. I try to make that clear all along, the points on which I do testify. While property being paved does not necessarily make it sell for more money at some future time it makes it sell for more than it would have sold if the paving had not been down. I mean that property which is paved will
369 sell for more than unpaved property of the same character, although depression may have taken place after the paving was put down. In other words I think that special improvements in the way of paving of streets are worth two dollars to one of cost almost without exception.

Q. Isn't it a fact that in the neighborhood of Judge Field's property there has been more asphalt pavement put down and more houses built in the last three or four years than almost any other neighborhood in the city?

A. Within a radius, yes, sir.

Q. And notwithstanding the building of houses and all the asphalt paving and building of sidewalks the property has not increased in selling price.

A. It has in some localities.

Q. I am talking about Judge Field's.

A. I do not know that Judge Field has ever offered the property for sale.

Q. Well in the locality including the property that you yourself bought from Mastin?

A. No, there has been no material advance in the sale.

Q. Now to make the idea I have been trying to express a little clearer I will ask you if this would not be so, that if there was only one or two or three paved streets in good neighborhoods in the southern part of this city, wouldn't the property on those streets on account of that pavement be immensely more increased in value than it has been in view of the great number of streets that have been paved?

A. Yes. This is true and Troost avenue is a notable example. The fact of the improvement on Troost avenue, or the fact that Troost avenue was paved in advance of Forest and Harrison had the effect of running values up on that street to an excessive degree, and since the paving of Forest, Harrison and Campbell there has been a tendency to equalization of values.

370 Q. By pulling down Troost avenue?

A. By pulling down Troost avenue from the unreasonable advance which took place because of its monopoly of paved street.

Q. Now in the neighborhood of Judge Field's property the majority of the streets were all paved about the same time with asphalt, Main street, Wyandotte street and Baltimore avenue, 35th street, 36th street and Warwick boulevard, so that there was an immense amount of paving done in that immediate neighborhood just about the same time,—now don't you think the result of all of that was to leave the property just about where it was before it was paved at all so far as an increased selling price was concerned on account of the great amount of paved property that was thrown on the market?

A. To have a proper understanding of any such inquiry we cannot loss sight of the fact that prices were boosted to an unreasonable elevation some years ago.

Q. That was ten or twelve years ago.

A. As a matter of necessity,—as a matter of history in all similar cities there has been a gradual shrinking until values have reached what is a sensible income basis. Therefore a comparison of values set upon paved streets three, five or ten years ago ought not to be considered in comparing the value of present paved streets.

Q. I did not intend to ask for a comparison of the value two or three years ago with the value in 1887 the height of the boom in Kansas City, but I meant to ask you as a fact, when about the same time all these streets were paved if it did not have a tendency to throw an immense amount of property on paved streets on the market in that neighborhood and consequently depress it or keep it from rising or being benefited in a financial way?

A. Well I think the records will bear me out in the opinion that sales west of Main street between 33rd street and Westport
371 avenue were very infrequent for a period of two or three years preceding this paving boom. The development that has taken place there is mostly since these streets were paved, and the local conditions where people are compelled to force property on

the market, not by reason of improvements or tax bills, stimulated speculators to go in and take up those properties and improve them, but that cannot be used as a demonstration of the effect of the paving upon the value of the lots.

Q. But don't you think that the leading down of the property in Kansas City by tax bills, including paving tax bills, and other improvements, has a tendency to make people let go of their property and let it go on the market?

A. My condid opinion is these matters to which you refer have had the same effect upon them that the old boom has produced.

Q. Well what is that?

A. Forced property on the market. It is the fault of their judgment. I believe that every tax that we have paid up to this time has strengthened the value of real estate, not excepting the park taxes.

Q. Although it has decreased the price it has increased the value?

A. I do not know that it has decreased the price. It would be very easy if I were to have the privilege of questioning you on increased values to demonstrate,—as I said a while ago I can give ten cases where these special causes have enhanced values and helped make sales to one you have produced.

Q. You can also produce cases where persons have absolutely abandoned their property right out in Hyde Park? I think it was about 38th and Warwick boulevard it was practically abandoned, it belonged to Homer Reed, or where Baird had a lot he abandoned?

A. No, that property was sold for forty dollars a foot and a
372 nice stone house built on it.

By Mr. SCARRITT: That lot Reed had he is holding on to I notice.

By Mr. SMALL:

Q. You do not know of *n*any property in that neighborhood that was abandoned on account of special tax bills?

A. I do not.

Q. You do not think the tax is a tax but it is a benefit?

A. I think a special tax is a betterment chargeable to the cost of the property, a special paving tax or sidewalk tax or curbing tax or sewer tax, I consider all special taxes that improve or make property useful are betterments and not properly speaking, taxes.

Q. The location of the property or necessity for it don't cut any figure as to the extent of those improvements?

A. The property which is held by owners for prospective profit in the way of advancement of prices needs these things in order to permit the holder to realize his expectations, and I have known cases in cities especially in Louisville, Kentucky, where street paving, gas, water and sewers were constructed beyond the built up portions of the town because people would not buy ground or build houses without those improvements.

Q. You do not think that this matter of public improvements

can be overdone and result in a detriment to the city and value of the property?

A. I do not think that any public improvement judiciously made can result in any detriment to the city or anything more than a temporary embar-assment or inconvenience to the owners of the property.

Q. Isn't it a fact that the improvement of streets by paving and sidewalks is just like the improvement of the property by building of houses, that it can be overdone and has been overdone in this town and has been overdone in this particular locality?

373 A. That paving has been overdone or building of houses?

Q. Paving.

A. No, sir, I do not think so.

Q. Do you think that it would benefit the city if they would pave every street in town with asphalt?

A. Yes, sir.

Q. And if they would build up every vacant lot?

A. If they had people to put in them.

Q. If there was no demand for them?

A. I feel perfectly sure that every house in town could be filled that could be built in ten months from now.

Q. I will ask you if the supply of vacant property has not been largely in excess of the purchasers in the last five or six years and for six or seven years before that?

A. It depends on the locality. On Walnut street there is one seller to twenty prospective purchasers.

Q. That is in the business heart of the city?

A. Yes, sir.

Q. I am talking about the residence portion of Kansas City?

A. We have put property on the market in certain localities that was desirable, notably Linwood and Lydia and Troost avenue below 33rd and Harrison street and 35th, and it has all been sold readily and a demand for more, but other properties the sellers are vastly in the majority, always will remain so.

Q. In the larger portion of Kansas City that is true?

A. That grows out of the fact that our city is badly scattered and very rough, but I do not think there has been any wild scramble to sell in well selected localities even in residence districts.

Q. There hasn't been any wild scramble to buy?

A. Well in some localities, yes, sir. We have five acres at Linwood and Lydia sold in about nine months and several lots have been sold a second and third time at increased prices since.

374 Q. I will ask you this general question, if it not a fact that at the present time and for the last ten years, in Kansas City as a general thing the parties who wanted to sell, the sellers and the supply of real estate and vacant property, has greatly exceeded the demand?

A. From necessity that is true in any growing city, unfinished city.

Q. Well there was a time in Kansas City and you have seen it, when the buyers greatly exceeded those who wanted to sell?

A. No, I was not here,—from all I can learn that was simply a gamble just the same as wheat in Chicago.

Q. I believe that is all.

E. R. CRUTCHER.

Sworn to before me on the day within the hours at the place in the behalf first aforesaid and subscribed in my presence this 14th day of June, 1900.

ALFRED FIDLER,
Notary Public, Jackson County, Mo.

Not being able to complete the taking of these depositions on this day by reason of the absence of other witnesses whose deposition- the defendant was desirous of taking, by and with the consent of the parties complainant and defendant to this action, I adjourn the further taking of these depositions until Monday, April 16th, 1900, then to be resumed at the same place and within the same hours mentioned in the annexed notice, and in the caption hereof.

Given under my hand and notarial seal, April 14th, 1900.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Mo.

375 Pursuant to adjournment as above stated on this the 16th day of April, 1900, between the same hours mentioned in the caption hereof and at the same place, all parties complainant and defendant being in attendance in person or by counsel, I resumed the taking of these depositions as follows:

[SEAL.]

A. D. BEEDLE, of lawful age, being produced, sworn and examined on behalf of the defendant, deposeth and saith as follows:

Direct examination by Mr. SCARRITT:

Q. Please state your name, place of residence and occupation.

A. A. D. Beedle, 3608 Baltimore avenue, Kansas City, Missouri. Business, real estate and insurance.

Q. How long have you followed that business in this city?

A. About twelve years, a little over.

Q. Are you acquainted with the situation of property on Main street between 31st street and Westport avenue and on Baltimore and Wyandotte streets between Thirty-third and Westport avenue?

A. Yes, sir, pretty familiar with it.

Q. You live on one of those streets, do you not?

A. I live on Baltimore.

Q. And how long have you lived in that vicinity?

A. I have lived there ten years, moved there in 1890.

Q. Do you remember the fact of the laying of the asphalt pavement on each of those streets in the fall of 1897?

A. Yes, sir.

Q. Are you familiar with the lots of the complainant Field described in the bill of complaint in this case, some of which front on each of those streets?

A. Why I am familiar with all the ground in both blocks.

Q. Referring to lots one and two, block 39, and the south 15 feet of lot one, block 50 that joins to the two last above described in Hyde Park and lots one to five, block 45, also in Hyde
376 Park, which front on Main street you may state whether or not in your opinion those lots were specially benefited and enhanced in value by reason of the construction of the asphalt pavement under the contract referred to in the bill of complaint and if so please state the extent of their special benefits.

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Why in my opinion they were benefited by the pavement.

Q. Yes?

A. Yes, sir, there is no question in my mind in regard to that.

Q. How much would you say they were benefited if they were so benefited and enhanced in value?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Why I should say as much as five dollars for just the paving alone. Of course they were curbed as well and that don't seem to be taken into consideration.

Q. No, I do not care for that.

A. Well five dollars anyway, five dollars benefit.

Q. You may state whether or not in your opinion all of the lots abutting on the said pavement laid on Main street between 31st and Westport avenue were specially benefited and enhanced in value by reason of the construction of the said pavement?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir, I should think so. I do not see why there would be any difference in regard to the lots, why one would not be benefited as much as another.

Q. They are all similarly situated with reference to the improvement are they?

A. Yes, sir.

377 Q. What would you say was the special benefit to each lot abutting on that improvement by reason of this pavement?

A. Over and above what it would be if they were in an unimproved condition?

Q. Yes.

(Same objection as above.)

A. Well there would be no doubt but there would be as much as ten dollars per front foot taking an improved street over an unim-

proved street. I make that statement knowing ground I had to sell prior to the pavement. As soon as the improvements were put in there was an advance of ten dollars per front foot put on them immediately. That is what I base my theory on in regard to that.

Q. Now it appears from the allegations of the bill that the complainant owns lots eight, nine and ten, block 45, Hyde Park, lots seven and eight, block 39, lot one, block 49, and the south 15.17 feet of lot two, block 50, which abut on Baltimore avenue,—please state whether or not in your opinion these lots were specially benefited and enhanced in value by reason of the construction of the asphalt pavement on Baltimore avenue under the contract referred to in the bill of complaint?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir, I think they were benefited, to the amount I have stated above.

Q. Is your opinion with reference to all of the lots that abut on Baltimore avenue along the distance improved by this pavement the same as you stated with reference to Main street?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir, just the same. To bear out my statement in
378 regard to Baltimore avenue on this theory,—it will probably be a little more satisfactory to the judge that I lived there all the time. Before we got Baltimore — paved we had one house in the block south of where I live between 38th and 39th, we had one house, Dunshea, on the corner, before we got that improvement, and since we got the improvement in on that street both sides of that street are practically all built up with houses of six or seven thousand dollars, the finest residences we have out there, a block of them, and I attribute their coming there on account of the street improvements. The location, of course, is fine.

Complainant moves to strike out the answer as not responsive to the question.

Q. It appears from the allegations of the bill that the complainant owners — lots three and four, block 41, in Hyde Park, which front on Wyandotte street,—please state whether on not in your opinion those lots were specially benefited and enhanced in value by reason of the construction of the asphalt pavement on Wyandotte street under the contract referred to in the bill of complaint?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir, I think they were benefited.

Q. To what extent?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. The improvement of the street to the amount of ten dollars per foot.

Q. State whether or not in your opinion all of the lots abut-ing on that improvement were specially benefited and enhanced in value to the same extent according to the frontage of the respective lots on the improvement?

379 (Same objection by complainant.)

A. Yes, I think all shared equally in the advantage of the improvement.

Q. Are all of the lots on that part of Baltimore avenue and Wyandotte street referred to which abut on the improvements referred to similarly situated with reference to those improvements and the improvements on the respective streets?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir, all have the same advantages of the improvements.

Q. Do you know of any reason why any one lot should be benefited more according to its frontage than any other lot by reason of the improvement of the street on which it fronts?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. I do not know any reason why there should be any difference.

Q. You may state what the general effect on values in that vicinity has been of the improvement of these three streets as referred to in the pleadings?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Why the general effect in that locality has been to have the very best residences erected there and occupied by the very best citizens of the city. Prior to the improvements we had very few of them and now we have them all along on both Wyandotte and Baltimore and Main. These improvements are making a center there about the present terminus of the Westport cable and the streets are all improved and converge into that point. It is a good business point there.

380 Q. You have lived on that part of Baltimore on which the pavement was laid for about ten years you say?

A. Yes, sir about ten years. I moved there in 1890. I have known all that country for thirty years, Westport and the tract of ground between Westport and the city.

Q. You may state whether or not under the conditions that exist now and have existed for the last several years property can be sold as city residence property unless the streets are improved?

A. The demand is now for lots on what they term "made streets." That means all improvements in. The demand for property on unimproved streets is very light if any at all. I have it every

day, the question "is it a made street, or are the improvements all in?"

Q. Take the witness.

Cross-examination by Mr. FIELD:

Q. The market in real estate in the last two or three years has not been stiff enough to demand the sale of lots unless the street is improved,—is that what you mean?

A. How is that Judge? (The question is read). *A.* Why in the last two or three years the market has been fairly good and it is good to-day.

Q. As I understand you there is no demand for real estate unless it is on a main street?

A. There is considerable demand on a paved street or made street.

Q. Do I understand that property on Baltimore and Wyandotte street would not sell at all if those pavements were not there?

A. At the present time and with the present surroundings of our city. Well, I may state they would not sell for the purpose they have sold, no, they would not, Judge, I don't think.

Q. How long has it been since there was a very active demand for real estate out in that country?

381 A. In that immediate vicinity around there?

Q. Yes, sir.

A. In the last two or three years.

Q. I mean before they were paved.

A. Well the streets there that got the first improvements had the lead in the matter. Take Warwick avenue for instance, it built up very quick after it was paved and improved. That was the first street we got improved there.

Q. Do you remember when there was an active demand for real estate in Kansas City?

A. Yes, sir.

Q. Out in that country was there an active demand for that at the time real estate was high in Kansas City?

A. Yes, sir.

Q. That was considered a very fine suburb?

A. Yes, sir.

Q. What made it good?

A. We were all crazy on real estate.

Q. You may be crazy on pavements now may you not?

A. We may be, of course that was during our boom.

Q. Who built these houses you have been talking about that have been built out there?

A. Most of them were built by Mr Finlay. On Baltimore?

Q. Yes sir.

A. Most of them built by Mr. Finlay.

Q. Do you know what they cost?

A. No, sir I do not Judge. I know what they cost some of the purchasers.

Q. Do you know what it cost him to build some of those houses?
A. No, sir.
Q. He built and sold them on the installment plan?
A. Usually so.
Q. That means that people of salaried means of support getting so much a month and paying so much a month on them purchase them in that way?
A. Well some mighty good men bought out there,—take Robert McClintock, he is not a salaried man.
Q. Where did he buy?
382 A. 37th and Baltimore, and take Mr. Irwin of the livestock commission firm, he is not a salaried man.
Q. Well all of them if you know them.
A. I ain't familiar with the others, there are other- in there, business men and other livestock commission men, but I do not remember the names.
Q. They bought on the installment plan, did they or did they not?
A. I do not know how he sold them.
Q. You say you are a real estate man?
A. Yes, sir.
Q. Have you sold a piece of real estate anywhere in Kansas City recently?
A. Yes, sir, sold a piece Saturday.
Q. What is the number?
A. 3613 Wyandotte street.
Q. A pretty good piece of real estate?
A. Yes, sir.
Q. How much did you get for it?
A. $4800.
Q. How many feet front?
A. Fifty.
Q. A good brick house on it?
A. Pretty good, built during our lively times. It is a pretty good house.
Q. Was there any mortgage against it?
A. Yes, sir. The man that bought it though could pay it off if he wanted to and have plenty left.
Q. Who sold it, who was the owner?
A. N. Evans, Eureka, Kansas.
Q. How long had he owned it?
A. Oh seven or eight years.
Q. What did it rent for before he sold it?
A. It rented for thirty dollars a month,—it was worth forty.
Q. Rented for thirty dollars a month?
A. Yes, sir.
Q. A fifty foot lot was it?
A. Fifty feet.
Q. What was the number of it?
A. 3613, I think.

Q. Do you know that was all it rented for, thirty dollars a month?

A. That is my understanding I am pretty certain it is.

Q. A fifty foot lot?

A. Yes, sir.

383 Q. Have you paid your tax bills yet for paving Baltimore avenue?

A. The biggest part of it, yes, sir.

Q. It's in an installment tax bill?

A. Why I did not take advantage of that installment privilege. I should have done it, but I think it ran four years and I was in no hurry for it—I paid off the bulk of it recently.

Q. Was it an installment tax bill?

A. Originally.

Q. In three installments?

A. I could not say. I think it was four but I did not pay it off in installments.

Q. How did you pay it off?

A. I paid it off by paying a certain amount and getting credit on my tax bill.

Q. Have you been sued on it?

A. Suit has been brought.

Q. The defendant Barber Asphalt Company has brought suit on that tax bill?

A. They have brought suit but my intention is to pay it up before judgment is rendered.

Q. When did they sue you?

A. I do not know when it was, sometime ago.

Q. Have you got any of the receipts with you for money that has been paid them by you, paid the Barber Company by you?

A. If I haven't put the receipt away I have it Judge.

Q. When did you get this receipt?

A. Why it is dated.

Q. Well when did you get it?

A. The day it is dated.

Q. Can you remember without looking at it?

A. I think it was Saturday. I came over last Monday to pay it but I could not get around to it and finally Saturday I had a meeting at half past one o'clock.

Q. Did you pay in a check?

A. No, sir.

Q. Cash?

A. Paid it in two bills of a hundred dollars each were the denominations.

384 Q. Where did you get the money from?

A. None of your business.

Q. It was not passed over to you by the Barber Asphalt Company?

A. No, sir, I got the money out of the Bank of Commerce quite a while ago and carried it in my pocket to pay on these tax bills.

Q. How long had you been carrying it in your pockets?
A. I do not remember, two or three weeks, you can place it if you go to the West Plains bank. I got it from there.
Q. It is a check you got from West Plains?
A. West Plains, Missouri,—it was on the West Plains bank.
Q. I do not understand you, Mr. Beedle?
A. I will have to go into details. I sold a little property in Howell county and I paid up the taxes and after the commission came out there was about four hundred and fifty dollars left and he sent me a check and those were two bills I got from the Bank of Commerce where I got it cashed.
Q. Do you keep your account in the Bank of Commerce?
A. No, sir, I keep it in the Kansas City State bank.
Q. You deposited the balance of this money, did you?
A. No, sir, I think I used it up.
Q. Did you deposit it in any other bank?
A. No, sir, I had occasion to use two or three hundred dollars.
Q. You cannot read that writing?
A. I can read it.
Q. Is this all you have ever paid then on those tax bills?
A. That is all, yes. It was $262.62 that was my total.
Q. On two lots, fifty foot lots?
A. One 50 and one 41.
Q. And $262.00 was the total?
A. $262.62 I think after they run four years.
Q. How much more do you owe them on that tax bill?
A. $100.00 interest and all.
Q. Have you figured it?
385 A. Yes, sir, I think $111.00 and something. $111.00 and some cents,—oh yes I figured it.
Q. When were you first talked to about being a witness in this case?
A. Why here Saturday.
Q. It never was mentioned to you before you paid this money?
A. No, it was when I paid that one of the firm asked me when he found out I lived out there it first came up.
Q. Do I understand you this is the first payment you made on the tax bill?
A. That is the first I have ever made on that improvement there, yes, sir. I think they run four years.
Q. How much more do you owe the Barber Asphalt Company on your two bills?
A. One hundred and eleven dollars and some cents.
Q. Besides the costs?
A. Yes, besides the costs.
Q. I notice that the receipt does not say anything about any arrangement with you about the balance?
A. About the balance?
Q. Yes.
A. Well I am to pay the balance just as soon as possible inside the

next six months and my case was to be continued on the docket instead of judgment rendered. That was the agreement.

Q. Who was that agreement made with?

A. Mr. Griffith.

Q. When was that agreement made with you?

A. Last Saturday.

Q. Was that before you concluded you would come up here and testify?

A. Yes, at the same time. I had paid my bill before anything was said about this. We got talking about it and I asked where he lived and he asked me where I lived.

Q. Have you got much property?

A. I am comfortably situated yes.

Q. What are you asking time for to pay a hundred dollars?

A. I have a good deal of property and not much rental property.

386 Q. You are no better fixed than I am?

A. I wish I was in as good fix as you are Judge.

Q. Have you got any mortgage on your place?

A. No, sir, my place is clear, I do not owe anything on it but this one hundred and eleven dollars. I guess the commission I will get out of that Wyandotte Street sale will help me out on that.

Q. Are you a large real estate dealer here in the city?

A. No, sir, I am not. I have always been in the real estate business during the last nine or ten years.

Q. There has not been much doing in the city in real estate has there?

A. There has not been until the last two or three years.

Q. Nobody has sold real estate in the last ten or twelve years except by forced sale?

A. It does not make any difference to the agent, there is business going on. There is always some of that going on.

Q. Going at a sacrifice, going to pay mortgages and tax bills?

A. Going to pay mortgages and tax bills.

Q. Now isn't it a fact that nobody except those forced by reason of mortgages and tax bills have been making sales here in the last twelve years?

A. No, sir, it is not,—well of course that has been true in a great many cases.

Q. Do you think there have been active sales of real estate around where you live in Hyde Park for the last ten years?

A. Not continual, no.

Q. Have they been continual in the last five years?

A. Pretty good in the last five years.

Q. Do you know of any sales out there in 1897 before these pavements were made in the same year,—did you know of any property selling out there then?

A. 1897?

387 Q. Yes.

A. I do not call *ot* mind any.

Q. Do you know of any in 1896?
A. None of my own sales.
Q. Any of any body else?
A. I cannot keep track of other people's work.
Q. Do you know of any sales there in 1898?
A. I know sales could have been made.
Q. You do not recall any though that were made in 1898?
A. Why yes, there was quite a number of sales out there but I can'- recall who made them. I did not make any myself.
Q. Do you know of any?
A. I say I cannot recall who made them. There was sales made out there.
Q. You cannot say who they were or the property?
A. No, sir,—I have heard too, but there has been sales going on all the while in the last three years.
Q. You said you could not give any in 1896, '97 and '98 of your own knowledge?
A. I do not kwwp track of what other people are doing.
Q. Do you know what Mr. Finlay paid for the property *be* bought of Mr. Mastin between Thirty-seventh and Thirty-eighth?
A. No, sir, I do not know what he paid for that.
Q. That is a little better property than yours, a little higher ground?
A. Yes, sir.
Q. And it is a little higher ground between 38th and 39th on Baltimore?
A. Thirty-ninth is the summit of the ground out there.
Q. Now there is a sort of a rise from 37th to 38th a sort of a crown, it rises in the center and goes down again?
A. No, sir.
Q. Don't you know the ground is low on Baltimore avenue, between 38th and 39th on Baltimore?
A. No, sir, it is a plane from 39th to 38th.
388 Q. I am not talking about the street proper, I am talking about the surface of the ground.
A. Yes, on the east side of Baltimore avenue.
Q. It is a little low, isn't it?
A. Yes, sir.
Q. Isn't there a sort of a rise from 37th to 38th on the lots? Doesn't it make a sort of a crown, doesn't it rise and then go down?
A. The natural surface of the ground?
Q. Yes.
A. Probably it was originally that way.
Q. Isn't it that way?
A. No, sir, because it is all graded down to four or five feet above the curb, it is cut down. Originally it quite likely was that way.
Q. And where you are it is a little low?
A. Yes, sir, right north of me. 36th street is the lowest point.
Q. You say you are in the insurance business?
A. Yes, sir.

Q. What kind?
A. Casualty indemnity.
Q. Soliciting business?
A. No, sir, I am district manager here for the Northwestern.
Q. You draw a salary from that company?
A. Not a salary, I get good compensation for my work.
Q. Do you spend more of the time in that than the real estate business?
A. Yes, sir, there is a good deal of office work, and I have my solicitors.
Q. The Barber Company called on you with their petition for that work?
A. Yes, sir.
Q. Who was it called on y[illegible]
A. I do not know it was their solicitor.
Q. It was worked up by the agents of the Barber Company?
A. Yes, sir.
Q. That was before the council took *my* action in the matter?
389 A. I do not know whether they took any action or not.
Q. There were very few houses on Baltimore avenue at that time?
A. Very few.
Q. Very thinly settled?
A. Yes, sir.
Q. There was nothing north of 35th up to 33rd on Baltimore avenue, three blocks there?
A. I do not think there was anything from 36th to 33rd before the improvements were in.
Q. And there were very few houses south of you to Westport avenue?
A. There was only one between 37th and 39th, or two.
Q. Now 33rd street is the north line of these pavements on Wyandotte and Baltimore?
A. Yes, sir.
Q. And those streets stop there and turn either east or west to Broadway to go into the city, don't they?
A. Yes, sir.
Q. They are not continuous into the city?
A. No, sir.
Q. Now take the south end,—do they continue on south or do they stop when they get to Westport avenue?
A. Baltimore stops at Westport avenue and Wyandotte street intersects Westport avenue but there is a jog in it.
Q. They are not continuous streets north on 33rd nor south of Westport avenue?
A. No, sir.
Q. Main street is a longer street, it is a continuous street?
A. By making a jog around the old Carney property.
Q. I mean going north Main street is a continuous street?

A. Yes, sir.

Q. Now Baltimore avenue where you live never had anything but a dirt road there before this pavement?

A. That is all.

Q. Wyandotte street was macadamized by Westport a very few years before this pavement?

A. Yes, sir.

Q. A good street?

A. A fair macadam street.

390 Q. A good macadam street before the pavement was laid?

A. I heard people who lived on it complain.

Q. A good many people do not like macadam?

A. Yes; sir.

Q. Did you see anything wrong with the macadam before it was laid with asphalt?

A. I don't know.

Q. It was as good as any macadam street?

A. Yes, sir.

Q. Main street,—was that macadamized too?

A. Yes, sir.

Q. Do you know anything about the condition of the macadam in front of my property?

A. Between 38th and 39th?

Q. Between 39th and Westport avenue?

A. It was a good macadam pavement in your front.

Q. The street was all right in front of my property, wasn't it?

A. Yes, sir, it was good macadam.

Q. That is all.

Re-direct examination by Mr. SCARRITT:

Q. The macadam streets you refer to are made out of this soft limestone rock?

(Objection as leading.)

A. Yes, sir.

Q. When the wind blows in the dry weather in the summer time what is the effect on those streets?

A. In dry weather clouds of dust and in wet weather slop, they always wear bored out that way.

Q. What do you mean by boring out that way?

A. It is the result from the macadam. It is that kind of a road in dry weather and that kind in wet weather, it is clouds of dust in dry weather and sloppy in wet weather.

Q. It is because of that limestone pulverizing.

A. Yes, sir.

391 Q. Does a macadam pavement make an agreeable residence pavement?

A. Does it make an agreeable pavement for a residence street?—no, it does not. I lived on a macadam street on Troost.

Q. The dust gets into the houses and soils the carpets and furniture?

A. Yes, sir, it is very hard on the furniture. It sifts in at the windows.

Q. Are there macadam streets to speak of in Kansas City, now?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. If there is some I can't call to mind now where there is any. Westport avenue is macadam yet.

Q. It is subject to the same complaints as the others, is it not?

Counsel for the complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. There is not a macadam pavement in this city that you know of on a first-class residence street, is there?

(Same objection.)

A. No, sir, there is not, especially those made of our native stone.

Q. That is what I refer to, limestone macadam. The rock streets used on the boulevards is made out of imported granite, is it not and is about as expensive as asphalt?

Counsel for complainant objects to the question as immaterial.

A. Yes, sir.

Cross-examination by Mr. FIELD:

Q. How do you know anything about where this granite on the boulevard comes from, about it being imported?

A. Well I do not.

392 Q. You told Mr. Scarritt it was imported?

A. It is a foreign stone from anything we have around here, it is different from anything we have in this locality.

Q. Is not the reason they do not have dust on it because they sprinkle it every day.

A. Well, that will lay the dust, yes, sir.

Q. Do you know anything about any dust on Wyandotte street and on this macadam on Main street I have asked you about, did you see any dust on that?

A. During the time it was paved?

Q. Yes.

A. Yes, sir, I have almost been blinded with it time and time again.

Q. By Major Warner's residence the county put in a good deal of cheap macadam there, didn't it?—was it by Major Warner's residence?

A. Well I have seen dust in fact all along there from one end to the other during the paved time.

Q. Do you know anything about the macadam in front of block 45 on Main street?

A. Yes, sir.
Q. Were you along there at any time?
A. Yes, sir.
Q. Was that breaking up like the balance of them?
A. If I remember it was.
Q. You do not know anything about that being paved with superior macadam, do you?
A. No, sir.
Q. The city of Westport paved a great many streets with that same macadam?
A. Yes, sir.
Q. And issued tax bills for thousands of dollars for it a few years ago.
A. Yes, sir, I did not have any experience with those tax bills.
Q. Well the city of Westport just before this asphalt paving paved block 45 with macadam?
A. I do not know how long before, but it was paved with macadam.
Q. The macadam was not gone?
A. Not entirely gone.
393 Q. Was it gone at all?
A. Some places it was badly gone.
Q. Where?
A. From 35th to 36th on Main it was gone almost entirely.
Q. I am speaking about down in front of block 45.
A. If I remember right that was in fairly good condition.
Q. The other you are talking about was done by the county?
A. No, sir, from 35th street along there by Mastins.
Q. Don't you know the county court did that and didn't charge Mastin anything for that?
A. No, sir.
Q. But you do not know anything wrong about the macadam down along block 45?
A. No, sir.
Q. That seemed to be better than the other?
A. It seemed to be always in good condition.
Q. And what you say about dust on macadam, that is the trouble with all macadam?
A. Yes, sir.
Q. There is a good deal of mud gets on asphalt streets?
A. Yes, sir.
Q. They are not cleaned are they?
A. No, sir.
Q. It is too far out for the city to keep those streets clean like they do down town?
A. It is too far out.
Q. They do not clean those streets like they do Main street?
A. They run a sweeper clear out there.
Q. On Baltimore avenue?
A. Not on Baltimore avenue, on Main.

Q. On Wyandotte street?

A. Not on Wyandotte either that I know of.

Q. Do you know anything about what property sold for around the Baptist church there on Baltimore avenue before the pavement?

A. Before the pavement?

Q. Yes.

A. Yes, sir.

394 Q. Did you know I sold the lot to the Baptist church there about 1889 or 1890?

A. I remember something about it. I was one of the building committee of that church.

Q. Do you know what they paid me for those two lots?

A. Wasn't it forty dollars a foot?

Q. $55.00 wasn't it?

A. I did not know we paid that much. I know we paid a pretty good price for it. Is that what you got?

Q. John B. Wornall gave me that.

A. He bought the ground and gave it.

Q. 1889, wasn't it?

A. It was along about that time.

Q. It was after the boom, wasn't it?

A. It was going out.

Q. It went out in 1887, didn't it?

A. It kept alive until 1891 or 1892.

Q. What did that property bring before the pavement at the church?

A. About $25 or $30 a foot.

Q. Was it not bringing more than that?

A. Well you are speaking of 1894 now?

Q. Yes.

A. No, it would not.

Q. Wouldn't it bring more in 1895 than that?

A. I should judge it would hold that anyway, maybe a little better.

Q. Baltimore avenue?

A. Could have sold some in there in 1896 at thirty dollars a foot.

Q. It was worth that in 1896, was it?

A. Oh yes.

Q. You think Baltimore Avenue property was worth thirty dollars a foot along there in 1896 do you on a dirt road?

A. Yes, thirty dollars.

Q. Do you know what Mr. Mastin sold Finlay those lots on Baltimore avenue for between 37th and 38th?

A. I do not know.

395 Q. Don't you know he only got $27.50 a foot for that?

A. That was before they had the pavement on?

Q. After the pavement?

A. Did that include all bills?

Q. Yes.

A. $27.50 a foot?
Q. Yes.
A. I never knew what he got for it.
Q. You said it was worth $30 a foot?
A. I am talking about the Baptist church.
Q. You think the Baptist Church property is worth more than that property?
A. It was then.
Q. Now?
A. No, sir, because Finlay spent a good deal of money grading that property. It cost probably three dollars a foot to grade those two blocks then.
Q. That is all.

Re-direct examination by Mr. SCARRITT:

Q. What is the market value of your property on Baltimore avenue now?
A. About forty dollars a foot.

By Mr. FIELD:

Q. Is your property worth more or less than mine?
A. About the same.
Q. Will you give thirty dollars a foot for a corner in the same block that you are in?
A. There is one particular corner I would not.
Q. What corner is that?
A. It is the corner of 36th and Baltimore, the southwest corner of the street.
Q. Which corner is it you would not give that for?
A. The southwest corner of 36th and Baltimore.
Q. Suppose this is the corner of 37th and Baltimore, will you give thirty dollars a foot for that to-day? I do not own it, but I want to see.
A. I have not got a customer for it and I am not buying.
396 Q. Is that worth as much as my Baltimore front, the corner of 37th and Baltimore avenue?
A. Worth as much as your Baltimore front,—no, sir, your- is better property. I am on the other side of the street. Mine is an east front. It is better ground than that.

A. D. BEEDLE.

Sworn to before me on the day within the hours at the place in that behalf first aforesaid and subscribed in my presence this 15th day of June, 1900.

[SEAL.]

ALFRED FIDLER,
Notary Public, Jackson County, Mo.

Not being able to complete the taking of these depositions on this day by reason of the absence of other witnesses whose depositions the defendant is desirous of taking, by and with the consent of the

parties complainant and defendant to this action I adjourn the further taking of these depositions until to-morrow then to be resumed at the same place and within the same hours mentioned in the caption hereof and in the annexed notice.

Given under my hand and notarial seal, April 16th, 1900.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Mo.

Pursuant to adjournment as above stated on this the 17th day of April, 1900 between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, of said day, at the same place mentioned in the annexed notice and in the caption hereof, the parties complainant and defendant both being in attendance either in person or by counsel, I resumed the taking of these depositions as follows:

397 CHARLES E. FINLAY of lawful age, being produced, sworn and examined on the part of the defendant, deposeth and saith as follows:

Direct examination by Mr. SCARRITT:

Q. State your name, place of residence and business?

A. Charles E. Finlay. My residence is 4031 Warwick boulevard and I am a financial agent and real estate broker with offices in the National Bank of Commerce building in this city.

Q. How long have you been in the business of buying and selling real estate in Kansas City?

A. Fourteen years. I have resided in Kansas City twenty years.

Q. For the past six or eight years have you done an extensive business in your line?

A. Yes, sir, I have been buying property and building houses and selling them. I have built 190 some odd houses I believe in the last six years.

Complainant objects to all this testimony as immaterial and asks that it bo stricken out.

Q. Is it in the line of your business to know and form opinions as to the effect on the values of abutting lots by reason of paving and improving the street on which the lots front?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. State to what extent you have handled property in the southern portion of this city.

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Well I built some houses on Baltimore avenue and Main street and Wyandotte.

Q. Are those houses between 31st and Westport avenue?

A. 33rd and Westport avenue or Hunter avenue and West-
398 port avenue. The street is not open to 31st street.

Q. Are you familiar with the lots owned by the complainant Field in this case, described in the bill of complaint some of which front on each of the streets you have named?

A. Yes, sir.

Q. You may state whether or not in your opinion the lots of the complainant referred to in the bill of complaint were specially benefited and increased in value by reason of the construction of the asphalt pavement on the streets in front of them under the contract referred to in the bill of complaint?

Counsel for the complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir, I should think they were. I am satisfied they were benefitted I should say possibly on a conservative estimation, ten dollars per foot.

Q. Doed that answer apply to his lots on each of the streets named?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir and to any of the property on the streets.

Q. Do I understand you to express the opinion that each of the lots abutting on that part of Main, Baltimore avenue and Wyandotte street improved by these pavements were benefitted to the extent of ten dollars per front foot?

(Same objection.)

A. Yes, sir.

Q. You may state whether or not all the lots on Main street along the distance improved by this pavement have the same relative situation with reference to the street?

(Same objection.)

A. Yes, sir.

399 Q. And does the same answer apply to each of the other streets, Wyandotte street and Baltimore avenue?

(Same objection.)

A. Yes, sir.

Q. Do you know of any reason why any one of the lots on either of those streets along the distance improved was not benefitted to the same extent relative to its frontage that the other lots along the street were?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. No, sir, I do not see any difference at all.

Q. State whether or not you have purchased and sold lots fronting on either of those streets along the district improved?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir, I have sold property on Main and Baltimore and Wyandotte streets, which I consider I could not possibly have done if it had not been on account of the streets being paved.

Q. Is your estimate of the special benefit which accrued to each of these lots by reason of the construction of the said pavement based on your own experience in making purchases and sales and your general observation of the effect of such pavements on the value of abutting property?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. You may state to what extent you have purchased and sold lots abutting upon these improvements since their construction?

Complainant objects to the question as incompetent, irrelevant and immaterial.

400 A. Well I purchased a block of ground on Baltimore between 37th and 38th and built, I think 12 houses there, and I have sold them all.

Q. Did you make any other purchases and sales?

(Same obj.)

A. Yes, I purchased a block of ground between 35th and 36th on Baltimore and we sold that however, and I had a client who bought under my suggestion a block of ground on Wyandotte between 37th and 38th in which I s-ld some lots there and built some houses.

Q. At what prices were those purchases and sales made?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. I bought the ground there at an average of about $28 a foot and I sold it at about, after putting down the sidewalks, stone sidewalks, at an average of about $38 a foot to $40.

Q. Were there any peculiar conditions existing by which you got this property at the special price you named?

(Same objection.)

A. Yes, I bought it from Mr. Ward who was the receiver for the Mastin estate, part of it, and the other I bought from Mr. Baker after having foreclosed.

Q. The Mastin property was in the hands of a receiver and it was required that he raise a sum of money?

A. Yes, sir it was a forced sale.

Q. State whether or not in your opinion you bought the property below its reasonable market value?

(Same objection by complainant.)

A. Yes, sir. I could not afford to be in the real estate business and pay full value for the stuff. If I could not get it at a bargain I do not see how I could continue in business.

401 Q. State the character and value of the houses that you erected on those lots.

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Well they run from about four thousand to $5500.00.

Q. Apiece?

(Same objection.)

A. Yes. They are modern houses.

Q. Please state the character of the persons who purchased or occupy those houses?

Complainant objects to the question as incompetent, irrelevant and immaterial and for the reason that it is not shown that the witness knows.

Q. You made the sales, did you?

A. Yes, sir I sold them to first class business men here in the city. I sold to Mr. J. L. Howe treasurer of the Belt Line Railroad Company, at 37th and Baltimore avenue, and next door to him Mr. Charles H. Mills, here, the agent here of the New England Life Insurance Company and next to him Mr. Clendening, the secretary of the Commercial club, and the next home I sold to Mr. Clark the Baptist minister, and he is renting it to Mr. E. E. Richardson, secretary of the stockyards, and the next home I sold adjoining that was to Mr. Will Irwin of the Irwin livestock commission firm, and the next place to Will Adams, and the next place to that to Mr. W. H. White owner of the White laundry here, and across the street I sold to Mr. McClintock the restaurant man on Walnut between 11th and 12th, and the next house was to Dr. Barber who is practising here in the Hall building at Ninth and Walnut, and next to that Mr. McDonald that moved here from one of the interior towns of Missouri, and the next house to F. J. Horn of the Kansas City Folding Box Manufacturing Company.

402 Q. He is the president of that company is he not?

(Same obj.)

A. Yes, sir.

Q. You may state the average price at which you sold the lots exclusive of the buildings?

Complainant objects to the question as incompetent, irrelevant and immaterial.

A. Forty to forty-five dollars.

Q. Fronting on these several streets?

(Same obj.)

A. Well on Baltimore avenue it is about $40 to $45 a foot.

Q. Have those sales been made since the pavement was laid?

Counsel for the complainant objects to all these questions as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. How long ago were the sales made?

(Same objection.)

A. Well some this spring and some last spring and some last year and the year before. I think I have been three years working on that street there.

Q. The sales on Baltimore avenue to which you refer have all been made since the asphalt pavement was laid there in the fall of 1897?

Counsel for the complainant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. Take the witness Judge.

Cross-examination by Mr. FIELD:

Q. When was it you bought this property from Mr. Mastin?

403 A. Well I think it was a little over two years, pos-ibly two years and a half ago if I am not mistaken.

Q. Was it since the pavement was put down?

A. Yes, sir.

Q. You paid him how much a foot?

A. I paid him for that block in there a little over twenty-six dollars a foot.

Q. Well how much over twenty-six?

A. Well I think it was about $26.50 a foot.

Q. Mr. Mastin had been holding those lots for quite a while had not he for sale?

A. Well I don't know. I suppose this property was on the market.

Q. If that block was only worth $26 a foot when you bought it and was increased in value ten dollars a foot,—if you bought that block for between "26 and "27 a foot after the pavement had increased the value of the block ten dollars a front foot then the property was not worth over $16 a foot before it was paved?

A. Well it did not have any sale. I do not think you can sell a lot on a good street now unless it is paved, I can't.

Q. Why is that, because there are so many paved streets in the city?

A. Well I do not know. I know one of the questions a person asks in looking for a house is "Is it on a paved street?"

Q. Is there a great deal of property on paved streets?

A. Yes, there is considerable property on paved streets, but the improvement is all being done on paved streets.

Q. What I want to get at is whether these streets were a large part of vacant property that was on asphalt streets or a small part?

A. I do not understand the question.

Q. Here were three streets out there very generally vacant at the time the pavement was laid?

A. Yes, sir.

Q. What I want to get at is whether that property was a large part of similar property on paved streets, or was it only a

404 small part?

A. Well there is quite a good deal of property on paved streets that has not been improved yet.

Q. So you would say of this property not on paved streets that you would not put any value on it at all?

A. I would not purchase any property unless it was on a paved street unless I could get it paved.

Q. Now these houses that you built, were they built to order for a particular person or did you have the plans made yourself to sell on the general market?

A. Well some I built to order and some I built myself for sale.

Q. Were any of those in this particular district built to order?

A. Oh yes, quite a good many of them. I built Mr. Howe's house to order, Mr. Will Irwin's house to order, Mr. Adams's house to order and Mr. Clendening's was built to order.

Q. Are these all that you built to order that you mentioned?

A. Yes, on Baltimore between 37th and 38th.

Q. What other houses that you built out there did you build to order?

A. Well I built fully one fourth to order and the other three-fourths I built to carry them until I could sell them.

Q. How many have you built altogether?

A. On those three streets now are you referring to?

Q. Yes, sir.

A. I should think about 28 to 30.

Q. And you think about one-fourth of those was built to order?

A. Yes, sir.

Q. Did you superintend the building yourself?

A. Yes, sir.

Q. In figuring these lots at $40 to $45 a foot you figure that above the price that you got for the improvements that you put on the lots?

A. Yes, sir.

Q. You gave the lots the benefit of the full cost?

A. Yes, sir.

Q. You did not estimate that the houses were worth any

405 more but you took the total cost of the improvement and total cost of the lot, then sold and credited the profit to the front feet of each lot.

A. Well the way I do in business I advertise that I will sell ground at such and such price, ground on those streets at $40 or $45 a foot, and then I build a house according to a regular contract and separate my profit on the house and make a separate deal on each.

Q. Are you an architect?

A. No, sir, I employ different architects. I employ Mr. W. W. Rose, Mr. Root and different architects.

Q. Have you sold any of these houses on the installment plan?

A. Some on the installment plane and some for cash.

Q. What kind of an installment plan have you on these sales you have been making?

A. One-fourth cash, one-fourth in monthly payments and one-half running for a period of five years.

Q. One fourth cash, one-fourth in monthly payments?

A. Yes, sir.

Q. And the one-half balance at the end of five years?

A. Yes, sir.

Q. What proportion of those houses have you built and sold on that plan?

A. Well possibly ⅔ of them.

Q. All of these houses then except those that you built to order you built on the installment plan?

A. No, sir, I built some not to order and sold them for cash. Mr. McClintock's house was sold for cash.

Q. They pay you interest on the deferred payments?

A. Yes, six per cent. interest.

Q. Is that figured in the monthly installments?

A. No, sir, the monthly installment notes are made on or before and they pay the interest on the note when they take up the note.

Q. Are those installment notes paid monthly?

406 A. They are paid on or before.

Q. If you sell a house for six thousand dollars they pay you fifteen hundred dollars cash?

A. That is the idea.

Q. And then they give you fifteen hundred dollars in notes payable monthly?

A. On a six thousand dollar house I get about $1500 down and then there would be $1500 payable in monthly installments about fifty dollars a month, and the other half runs for the period of five years.

Q. When is the interest paid?

A. Semi-annually.

Q. So they have to pay you the semi-annual interest on the loan for five years?

A. Yes, sir.

Q. If there is any default the whole becomes due?

A. Yes, sir, but I will state that I never had a foreclosure on any of these streets.

Q. You have not built these houses long enough have you.

A. Well I am pretty near out on monthly payments on most of them.

Q. How long have you been in this installment business?

A. About six years.

Q. Mr. Scarritt asked you about the relative situation of these lots on these various streets and I understood you to say they were all the same?

A. You misunderstood or I misunderstood his question. What I meant to say is I think a lot five feet above the grade of the street is worth more than a lot five feet below the grade of the street but by the fact of paving each lot would be benefitted as much as the others. That is if a lot was worth $20 when it was five feet above grade before it was paved, after it was paved it would be worth thirty, and if it was worth fifteen dollars a foot if it was below the grade, before it was paved, if it was paved it would be worth
407 $25.

Q. And you put an arbitrary amount on the improvement?

A. Yes, sir.

Q. What is the state of the market here in real estate?

A. Well the state of the market here I should say is very unsatisfactory for a property owner. It is pretty hard for a man to realize what his property is worth.

Q. How long has that been the state of the market here?

A. That has been the state of the market here for the past ten years. That comes simply because the outside people do not seem to appreciate the value of property. I do not know of piece of property in Kansas City that has been well sold in years. It would be an isolated case if I knew of a piece well sold.

Q. That is where you received the fair value?

A. Yes, sir, I consider the property I sell $40 or $45 a foot on Baltimore avenue, if that would sell for what it is worth it would be sixty or sixty-five dollars a foot.

Q. Yet you cannot get it?

A. Yes, and it is to be regretted.

Q. How long has that been true?

A. Well that has been true for the past ten years.

Q. That has been considered a choice prospective portion of the city for twelve or thirteen years?

A. Well yes, you see Judge I want to be perfectly fair, and the fact is the west side of Main street until the improvements was almost a stagnation on the market.

Q. Well there was none offered for sale was there?

A. Yes, there has always been property for sale out there right along.

Q. Some of the witnesses stated this Mastin property was
408 not put on the market?

A. Well they were more familiar then I was then. I have always understood the Mastin property was on the market at any time when he could get the price for it.

Q. You never had it offered to you for $26 a foot until it was offered to you?

A. Well Mr. Mastin is very peculiar. If he needs money he will sell it at a sacrifice and if he does not he will hold it away up and you can't buy it from him at all.

Q. Have you ever paid more than $26.50 a foot?

A. That is the highest I paid.

Q. And you bought a whole block?

A. Yes, sir.

Q. You say you bought a block between 35th and 36th?

A. Yes, sir.

Q. How much did you pay?

A. Thirty dollars. I bought that from Mr. Baker, Andrew J. Baker, I think is the name, was. That was foreclosed, some $60,000.00 of property.

Q. How much did you pay?

A. $30.00 a foot.

Q. That was nearer town?

A. I think it equally as good property as the other.

Q. Did you buy it after you bought the other or before?

A. I bought it here only eight or nine months ago.

Q. Do you think property generally in the city is in better shape now and better demand for it than there was two years ago?

A. Yes, I think there is a firmness in the market? People who are buying now look more to paying cash.

Q. Throughout the city?

A. Yes, sir, I think so.

Q. When did you buy this property of Mastin at $26 a foot?

A. I do not know definitely but I am under the impression I paid him cash for it. He needed the money and my impression is I borrowed some money on it and I paid off the money a little after the first of the year and that is about two years, so it would be a little over two years ago that I purchased it.

409 Q. You think the property is worth a little more now than when you purchased it?

A. Yes, sir.

Q. You think you yourself would have taken less immediately after you purchased it from Mr. Mastin than now?

A. Yes, if I can turn my money quickly I would rather do it.

Q. And you think that is true throughout the city?

A. Yes, I do not think there can be a real good price in one locality unless they get the benefit of it throughout the town.

Q. Now don't you think that property out there has maintained its prospects better throughout the dull period than any other property in Kansas City?

A. Yes, sir.

Q. It is a new country out there?

A. Yes, sir.

Q. And it is not held back by old buildings?

A. Yes, sir, well that very largely allowed me to sell my property there.

Q. Well Hyde Park has kept up its prospects as much as any other property in Kansas City,—depreciated as little?

A. Well the depreciation out there,—Mr. Mastin claimed to have sold this property here at $80 a foot one time.

Q. When was that he claimed to have sold it at $80 a foot?

A. During the boom, and had to take it back and then sold it to me for $26. If that is true that is the biggest depreciation I know of in Kansas City,—but if that is so Hyde Park has suffered no more than any other part of Kansas City.

Q. It has been considered one of the first class parts of the city for residence purposes and it has one of the finest street car lines in the city?

A. Well we used to think so but it has been very inferior in the last year, but they have promised us better service out there.

Q. In 1886 it was running there?

A. Yes, sir.

410 Q. And that territory after they got the street car line was sought after considerably during the busy times?

A. More for the purpose of speculation than for the purpose of utilizing it for homes,—they had no sewers.

Q. It was held very high?

A. Yes, sir.

Q. They had building restrictions there that would not allow a man to build a house unless he built a good house?

A. Four thousand dollars.

Q. On what street?

A. Well I think that was the building restriction where I built on Baltimore.

Q. What was the restriction on Main street?

A. Some of it was twelve thousand dollars. The properties I built on on Main street are north of 33rd street and there are no building restrictions there.

Q. Where is it you built on Main street?

A. I bought from the Duke W. Hunter estate on 32nd St. from Main running east to McGee.

Q. Did you build any houses on Main street?

A. Yes, sir. Do you know where the dummy line is?

Q. Yes, sir.

A. Well the next street north. I built all those houses on 32nd running over to McGee.

Q. How many fronting on Main street?

A. Two houses fronting on Main street.

Q. That is all you have built on Main street?

A. That is in that part of Westport.

Q. That is what I mean,—two houses?

A. Yes, sir.

Q. Now Wyandotte street and Baltimore avenue run parallel to Main street, do they not?

A. Yes, sir.
Q. And very close to Main street?
A. Yes, sir.
Q. Wyandotte street and Baltimore avenue you said a
411 moment ago ended on the north at 33rd street?
A. Yes, sir.
Q. They are not open north to the city here?
A. No, sir.
Q. Now on the south of Wyandotte and Baltimore what street do they run into?
A. Westport avenue.
Q. Well is that the end of them on the south?
A. It is on Baltimore and Wyandotte has a jog in it. It is practically the end there.
Q. Now you bought some property over there on Baltimore avenue south of the church near Westport avenue, didn't you?
A. Yes, sir.
Q. Did you buy that before or after the street was paved? and how much did you pay a foot for that?
A. Well I wanted to buy up that whole block in there and I succeeded in buying from W. A. Wilson, Clarence Palmer, Professor Jacquimot and F. J. Becker and that property taking the frontage on Baltimore, Westport avenue which is a macadam street, and Wyandotte street, cost me $23.32 a foot. How I happen to know that is I was just going through a statement of that addition there here a short while ago in settling up with a client who furnished me the funds for the improvement.
Q. You procured the funds for making the improvement from some other person?
A. Yes, sir.
Q. Is that your method of getting funds for building, trade the paper after you have done the building?
A. No, sir. Frequently I go to the person and call his attention to a good investment and agree to make the improvements for them and participate in the profits.
Q. So these improvements have been made by you for other people?
A. Partially by my own funds and partially by other people's.
Q. You make that a sort of business, building houses for sale?
A. Yes, sir, I would make it more correctly by saying
412 building houses and subdivision of lands.
Q. You are not very particular about who you sell your houses to so you get your money?
A. Certainly I am. I have a roll of honor. On the people who live there depends the neighborhood.
Q. You haven't any professional men there?
A. Dr. C. C. Olmstead and Dr. Barber.
Q. What is he, a bone doctor?
A. Yes, sir, he is an osteopath.
Q. He has a sort of a school for osteopathy?

A. Yes, sir.

Q. And has been indicted for issuing fraudulent diplomas?

A. No, sir, nothing that I know of.

Q. None of these people are large capitalists that you have named are they?

A. Yes, Mr. Adams is a man of pretty good means, I understand, of considerable means.

Q. Who is Mr. Adams?

A. He is a stock man. He just sold out a ranch he was interested in with Mr. Phil Chappell, and I understand Mr. McClintock is a man that is worth from $75000 to $100,000.00 here in the city.

Q. What business is he in?

A. In the restaurant business, and I never met a nicer gentleman that Mr. A. L. Howe, and I don't believe if you would go out and ask promiscuously who was one of the highest grade young men of the city, I don't think you would find anyone spoken better of than Mr. Charles Mills. He is a young man and a man of means and everybody likes him, and Mr. Clendening is a man well known.

Q. He is not a capitalist?

A. No, sir, I understand he gets about $4500 a year.

Q. These are all salaried men?

A. No, sir, Mr. Will Irwin is not a salaried man and Mr. McClintock is not a salaried man.

Q. Do you think that Mr. Armour being on Warwick
413 boulevard helps to sell that property out there?

A. Yes, I think that all nice residences help to establish the value.

Q. Mr. Armour's house is a house that cost fifty or sixty thousand dollars, isn't it?

A. Yes, I understood it cost more than that.

Q. A man of large means generally builds his own house, doesn't he?

A. Yes, that is true.

Q. Every man who is able to build a house for himself prefers that kind of a house to buying one that is already built?

A. Well, that is largely true.

Q. Well you take Troost avenue, the Hall & Porter Brothers have been very particular not only as to the persons but as to the wealth of the persons to whom they have sold their ground, haven't they?

A. Well I am not familiar with their methods because I have never operated in that part of town.

Q. Well when you got the price for a house you never stood back on whether a man added anything to the value of the neighborhood?

A. Well I never paid much attention to the money that he had but I have paid more attention to his character in the city.

Q. Has a man any reputation without money in Kansas City?

A. Yes, sir, I know some very excellent men in the city who are poor.

Q. Has a man any reputation here without money?

A. Yes, when I came here I had only three hundred dollars and I have worked up and if I had not a reputation I could not have done business and business is done by the men known as honest.

Q. Well if Abraham looked around he could not find them.

A. I never speak of my honesty, I let other people speak of that, but what I have done shows what people who have done business with me think of me.

414 Q. Mastin sold these lots to you because he esteemed you?

A. He met me coming down the incline and he said "If you will build some nice houses I will sell you this land," and I made the agreement and paid the cash inside of 48 hours.

Q. Who did you buy this other property from?

A. Andrew Baker.

Q. Some of that taken in under that foreclosure sold for less than thirty dollars a foot, didn't it?

A. I do not know.

Q. Bonfils bought some at $22 a foot?

A. I do not know about that.

Q. It is true there is something wrong with real estate values in this city?

A. Yes, sir.

Q. They have not near got up to confidence in the future of the city?

A. Well that is as good a reason as any to prescribe for it.

Q. You buy a piece of real estate and build a house on it because you know you get it so cheap you can let it go.

A. Yes I am willing to buy a piece of real estate when it is a little below the value and take my chances and improve it and sell it.

Q. And you have people that advance you the money to build these houses?

A. Yes, sir, that is the way I built up my business.

Q. Now, Mr. Finlay do you know what those houses you had out there rented for?—you spoke of one of them renting.

A. Yes, I sold a house to a party for $7250 and it is renting for sixty dollars a month and it is renting for ten per cent. gross, a little over eight per cent. net.

Q. What would you advise me to do with my property if I did not have the money to improve it?

A. Sell it.

Q. For these prices?

A. If you want to sell anything you must go on the market.

415 Q. You think you would sell it for the kind of prices you have been paying Mastin after holding it and paying taxes and being out the interest on your money for years?

A. Well I cannot advise another man. It is pretty hard to advise a man what he should do because my conditions are not the same.

Q. Suppose you did not need the money for anything more than paying tax bills, suppose you were out of debt?

A. Well that brings us to the question, Judge, that I consider any tax for the improvement of the street, is more than offset by the improvement.

Q. If you are out of debt and have no mortgages on your property and have the city come along and pave three streets on you and put a debt on you of three or four thousand dollars would you rather have your property clear of debt or would you rather have the pavement put down and pay the taxes?

Counsel for complainant objects to the question because it is based on a hypothesis not in this case, and is incompetent, irrelevant and immaterial.

Q. You know of no mortgages on my property?

A. No, sir.

Q. You do not know what I am worth?

A. How could that make me any money?—what you are worth?

Q. Assuming my property is clear and I have got money in this property and it is clear and this pavement was laid down in 1897, would you rather have those pavements laid down and mortgage the property and get under a mortgage of three or four thousand dollars or would you rather not have the paving done?

A. I will answer that to the point. If I owned that property without any street improvements on it, I would have gone myself and borrowed the money and encouraged other people to get the money and put the pavements down.

Q. You admit there is not any great demand for it?

416 A. Well it will come that much quicker.

Q. We have had three years and four months of that pavement.

A. Well I am selling my property out there to good people.

Q. You came in and got the property when it was paved?

A. I would not have touched it if it had not been paved.

Q. Suppose you had that property and there was no great demand for it on the market and was going to be no great demand for it for say two or three years?

A. Yes, sir.

Q. Now, without being in debt, without any mortgages on it, but desiring to wait and keep it until values returned in Kansas City, would you have favored the pavement in 1897, and be willing to wait to such a time as the property would come in active demand in consideration of the pavement?

A. Yes, I would because it is speculative when good times are coming. Now every foot of ground I have bought on an unpaved street I have immediately proceeded to pave it. The property I bought of Patterson Stewart on Prospect between 12th and 15th I immediately proceeded to pave it, also on 32nd street I purchased outside of the property I got from the Hunter estate sufficient property so as to give me sufficient ground for a majority on the street

and I immediately paved that street and on Woodward avenue the same thing.

Q. Suppose you did not care to engage in the kind of business you are engaged in, that you wanted your investments and you had some other matters to look after, would you still feel like making these improvements and executing mortgages and doing that kind of business?

A. Well that is too speculative. I could not imagine not being active in the real estate business because it is a business I love and want to stay in.

Q. Those who are forced to stay in are not in it for love?

A. You can sell out any time you wish, Judge.

417 Q. Yes, I can be held up. Q. Well if we ever come to a time when outside people come here and have confidence in our property and don't think they will be fleeced?

A. Well I have never found people who did not want to invest because they thought they would be fleeced. They think Kansas City is a city of some importance and destined to be a first class city.

Q. We all think that, Mr. Finlay, and want to hold on to our real estate and can wait four or five years for it as well as not.

A. My conclusion Judge, would be you and I differ in judgment only as far as our interests are not identical, but I am absolutely convinced that pavement of streets is a betterment and good times will come quicker by doing that.

Q. Good times throughout the country?

A. Throughout the city.

Q. We once had good values in Kansas City in real estate?

A. Yes but it was speculative, but now if a man buys a lot he says "I want to improve it" or "I have some definite and specific use for it."

Q. If I go on the market with my real estate and offer it for sale unless it was to a man who wanted to put a house on it it would make a difference of five or ten dollars a foot on it?

A. Well if you forced it on the market.

Q. If I can hold it and sell it to a person who wants to build on the property I can realize five or ten dollars a foot more?

A. Yes, a man never can realize as much until a person comes along who wants it.

Q. Do you think that property is liable to depreciate?

A. No, I think these improvements will keep it up.

Q. If these improvements had waited there would have been finer houses out there?

418 A. Well I do not think you can take a big district like that and have them all fine houses. Now you challenge my houses. Now I will say this to you, you cannot take a person coming to Kansas City to any block of ground in the city improved and show them a prettier block of ground that mine out there.

Q. Are you speaking on mine or yours?

A. I am speaking of mine because mine is improved and yours is not.

Q. I have not a block of ground?

A. If you had someone to build up around there it would be worth more.

Q. You would not give me $40 or $45 a foot?

A. No, sir, but I will give you the amount that I would be entitled to and make a profit.

Q. How much will you give me a foot for my property on Wyandotte?

A. I would have to take into consideration what terms you would want for it.

Q. Make your own terms.

A. Well I think I could place that property for you inside of 24 hours for said $32.50 to $35 a foot.

Q. Will you agree to take it for that?

A. Well you agree to sell it for that?

Q. Put your proposition in writing.

By Mr. SCARRITT: Let's don't have any bluffs, gentlemen. If Judge Field wants to sell his property he can do it.

By Mr. FIELD:

Q. Don't you know that there is property offered for sale on Baltimore avenue at thirty dollars a foot on the corner of 37th and Baltimore avenue?

A. That is by Mr. Green, he bought it for $24.50 or $25 and he is trying to scalp out five dollars a foot.

Q. Don't you know of parties that have paid more than that before the pavement was put down and are willing now to take $30
419 a foot?

A. No, sir.

Q. Do you know of any other property than this on Baltimore avenue at $30 a foot?

A. No, I do not.

Q. Do you know what I sold the lots where they built the Baptist church for?

A. No, sir, I suppose you got $75 or $80 a foot, that was right after the men got rich.

Q. No, I got $55 in 1889. You bought property south of the Baptist church, lots there in the same block since this pavement was put down for $23 a foot?

A. $23.32.

Q. That is since the pavement was put down?

A. Yes, sir.

Q. The- it was not worth but thirteen dollars a foot before it was put down?

A. I do not think it had any particular value then.

Q. You testify it was increased ten dollars a foot?

A. Yes, sir.

Q. Who did you buy that of at $23.32?

A. I bought some from William A. Wilson. It was at a time he

got caught on the Creek bonds and he wanted his money mighty quick and I gave it to him and the other from Clarence Palmer.

Q. None of these others were in close places?

A. Well Clarence Palmer got tired of holding this property.

Q. That was not on the pavements?

A. It was not on a pavement. It joined Jacquimot that was on a pavement. I bought property on Wyandotte, Westport avenue and Baltimore and it averaged me $23.32 a foot. The size of those lots there did not give it the true commercial value for the reason that a lot might be sixty feet in front but would run back in a keystone shape until it would be only about forty feet.

Q. Now I saw a lot advertised by you with a house out there for $3750.00?

A. That was a house on 32nd street.

420 Q. A house that you built?

A. Yes, sir.

Q. Don't you remember a house you built on Baltimore avenue near Westport avenue?

A. Yes, sir.

Q. And was advertised for quite a while?

A. Yes, but I never had anything to do with it.

Q. What did you advertise it for?

A. I did not advertise it. It was bought by Mr. Lincoln.

Q. Isn't your business name C. E. Finlay & Company?

A. C. E. Finlay Real Estate Company.

Q. Don't you remember of advertising the house at $3200?

A. No, sir, that is Mr. Weidlein. I sold it to him for $4500.

Q. How much did that house cost?

A. I do not think that is necessary for me to pick out certain cases.

Q. How much was that advertised for?

A. $4750.

Q. You said these houses cost from four to six thousand dollars?

A. Only in a general way.

Q. You do not want to tell what any one of them cost?

A. No, sir, and then tell you what my ground cost, no, sir.

Q. You just want to make the statement they cost from four to six thousand dollars?

A. I was referring then to those on Baltimore avenue between 37th and 38th.

Q. You did not refer to those houses you built on Westport avenue?

A. No, sir, my houses cost me from $3200 to $4700 or $4800.

Q. Haven't you been trying to get the building conditions lowered on Baltimore avenue?

A. No, sir, When I sold this last *last* lot of ground to Harry Train I told him I would assist him in getting them lowered if I could.

Q. Where is the bulk of the population in Kansas City, in which direction is it, what part of Kansas City?

421 Well I should say in the eastern part of town out on 12th street.

Q. That is the older portion of the city?

A. Yes, sir. And along over there on St. John, over in there, possibly Independence avenue.

Q. The northern portion and northeastern portion of the city?

A. Yes, sir.

Q. This Hyde Park has not been in the city limits except since 1897?

A. It was in once but it was declared illegal.

Q. Well when it really got in?

A. Yes, sir.

Q. Now after you get to Westport avenue on Wyandotte street and Baltimore avenue what is there south of that? Is there much population south of that?

A. Yes, sir, quite a little settlement out there where Baltimore avenue would come through. It is not open clear down.

Q. Quite an old part of Westport?

A. Yes, sir.

Q. There is nothing new or fine over there?

A. No, sir, just good old homes.

Q. Old fashioned homes?

A. Yes, sir. That is largely responsible in my estimation on account of the fact they have no sewers down there.

Q. How many people would you say live south of Westport avenue in the limits of Kansas City?

A. Well that would be just a matter of speculation.

Q. I want your best judgment.

A. Does that extend from the State line clear over?

A. The people that go over these streets that live south of there.

A. Well I have understood they commonly computed the people that come along there and come into the city are between six and seven thousand.

422 Q. Do you mean south of Westport avenue?

A. In this little neck of the woods south of Westport avenue and taking Westport avenue the artery of the town.

Q. I am not taking everything north of Westport avenue, I am talking about everything south of Westport avenue.

A. I should think there would be in the neighborhood of five or six thousand people.

Q. Clear over into the eastern part of the city?

A. No, sir, over as far as Oak street.

Q. Take it on the line of this street?

A. Well there is quite a little settlement over there.

Q. It runs down into a hollow past Westport avenue?

A. Yes, sir.

Q. There are huts and hovels down there?

A. Yes, sir.

Q. Do you know anything about these macadam streets on Wyan-

dotte street and Main street and Broadway before these asphalt pavements?

A. Yes, sir.

Q. They were all macadamized?

A. Yes, sir, but they were very objectionable streets.

Q. Which ones?

A. All of them.

Q. Did Westport lay the macadam on Wyandotte street in 1892?

A. Yes.

Q. Do you remember the condition of the street along there between 38th and 39th?

A. Well in a general way I know all the macadam streets out in Westport were very unsatisfactory.

Q. Well they issued several hundred thousand dollars in tax bills?

A. There were tax bills issued for the streets, but they were very unsatisfactory I know.

Q. How?

A. Well they were dusty and bad and had ruts.

Q. Do you know of any ruts between 37th and 38th on Wyandotte?

423 A. Well Wyandotte street was no- so bad, but Main street was wretched.

Q. Well I am speaking of in front of my property.

A. I could not say there was any bad ruts in front of your property.

Q. Don't you know on Main street in front of the car barn there that was one of the best pieces of macadam laid in Kansas City?

A. No, sir.

Q. You have not any positive knowledge about the pavement on Wyandotte street in front of my property?

A. No, sir.

Re-direct examination by Mr. SCARRITT:

Q. This block of ground that you bought from the Mastin estate at $26.50 as I understand you, you sold again within a few months afterwards at an average of forty to forty-five dollars a front foot?

Complainant objects to the question as leading and not according to his testimony. He says he figures it out and what he got from the houses, what he got above his profit on the houses was $40 to $45 a foot.

A. Well not within a few months, but inside of two years, I sold the ground, some that I did not improve and that that I did improve at from forty to forty-five dollars a foot. When I built a house for a party I would first sell him a lot at $40 or $45 a foot and then I would get up plans and specifications and he could go to any other builder in Kansas City and I would make first a profit on my ground and then a profit on my houses.

Q. You made a separate profit on the house over and above the profit you figured on the lot?

A. Yes, sir.

Q. You spoke of buying some property south of the Baptist church at $23.32 a front foot?

A. Yes, sir.

424 Q. A considerable part of that property as I understand it did not front on a paved street?

A. That is the idea.

Q. And the figure you gave is the average figure for all of it?

A. Yes, sir.

By Mr. FIELD:

Q. Where did it front if it did not front on a paved street?

A. On Westport avenue.

Q. How many feet of that was there?

A. 160 feet east of Baltimore avenue and 200 and some odd feet between Baltimore and Wyandotte streets out of a total purchase of about 900 feet, so that there was about one third off of an asphalt street and ⅔ on an asphalt street at the price of $23.32 a foot.

Q. And the part fronting on Westport avenue was on a macadam street?

A. Yes, sir.

Q. Macadam yet?

A. Yes, sir.

Q. What did you get for that when you sold it?

A. I sold that from thirty to thirty-two and a half a foot.

Q. On the macadam street?

A. Yes, sir, but the condition of that was that Westport avenue was believed some day would be a business street leading over to the cable.

Q. You put residences on it?

A. Yes, sir, and that is the argument I used in getting people to buy, that some day it would be a business street.

Q. You got how much on Westport avenue?

A. From $30 to $32.50 a foot.

Q. How much did you get on Baltimore?

A. $35 to $37.50 a foot.

Q. Which is the wider street, Baltimore avenue or Westport avenue?

A. Baltimore avenue is the wider street?

Q. Westport avenue is a very narrow street?

425 A. Yes, and the conditions are not the same, there is some little prospect of Westport avenue being some little of a business street, and Baltimore avenue no one would expect there would be business there.

Q. How far is this from the terminus of the Westport cable?

A. From 150 to 400 feet.

CHARLES E. FINLAY.

Sworn to before me on the day within the hours at the place in

that behalf first aforesaid and subscribed in my presence this 16 day of June, 1900.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Mo.

Now being able to complete the taking of these depositions on this day on account of the absence of other witnesses whose depositions the defendant is desirous of taking, by and with the consent of the parties complainant and defendant to this action, I adjourn the further taking thereof until May 1st, 1900, then to be resumed at the same place, and within the same hours mentioned in the annexed notice and in the caption hereof.

Given under my hand and notarial seal this 17th day of April, 1900.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Mo.

Pursuant to adjournment as above stated on this the 1st day of May, 1900 between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of said day, the parties complainany and defendant being in attendance either in person or by counsel I resumed the taking of said depositions at the same place

426 mentioned in the annexed notice and caption as follows:

By Mr. SCARRITT: Defendant offers in evidence tax bills referred to and more particularly described in the bill of complaint, namely tax bills numbered 7755, 7756, 7757 dated the 5th day of October, 1897, together with all the endorsements thereon, signed by H. C. Abercrombe, city engineer, being the Main Street bills, copies of which are attached hereto and made a part of this record.

Also tax bills numbered 8120, 8121, 8142, 8143, dated November 18th, 1897, together with all the endorsements thereon in each case,—signed by H. B. Abercrombe, city engineer.

Also tax bills numbered 8134, 8135, and 8136 dated November 18th, 1897, signed by H. B. Abercrombie, city engineer, with all endorsements thereon.

Also tax bills numbered 7760, 7761, 7762, 7763 and 7764, dated the 5th day of October, 1897, signed by H. B. Abercrombie, city engineer, together with the endorsements on same.

All of the tax bills above described and offered in evidence will be found attached hereto by a true and correct copy of same.

By Mr. FIELD: Plaintiff objects to the introduction of the tax bills above described, and offered in evidence because they are redundant proof as to the purport of the tax bills, which are admitted by the complainant's bill, and the complainant moves to tax the cost of the same to the plaintiff, no matter what the result of this cause may be. Complainant specially objects to the endorsements on the back of the tax bills offered in evidence, because the same are no

427–442 evidence of the date of such endorsements, nor the date of the delivery of said tax bills, nor are they relevant to the issue upon which or in support of which such tax bills are offered. That is all."

By Mr. SCARRITT: "The tax bills referred to together with the endorsements thereon are put in evidence for the purpose of showing their contents, and especially for the purpose of showing in connection with the testimony hereinbefore given as the *the* precise time the endorsements were made thereon, and the habit and custom of the engineer's and city clerk's office of the city of Westport of showing the date or dates of the making out of bills and the delivery and registration thereof."

By Mr. FIELD: "Complainant objects to the same as incompetent, for the purpose for which counsel for the defendant state they are offered."

* * * * * * *

443 UNITED STATES OF AMERICA, }
State of Missouri, County of Jackson, } *ss:*

I, Alfred Fidler, a notary public, within and for Jackson county, State of Missouri, do certify that in pursuance of the annexed notice, came before me at the law office of Scarritt, Griffith & Jones in the American Bank building, Kansas City, Jackson county, Missouri, Annie L. Fraser, A. S. Marley, E. H. Phelps, William S. Woods, E. R. Crutcher, A. D. Beedle, Charles E. Finlay and G. L. Carney, who were by me severally sworn to testify the truth, the whole truth and nothing but the truth of their knowledge touching the matter of controversy aforesaid; that they were examined and their examinations reduced to writing in shorthand by myself in the presence of the witnesses respectively, on the days, within the hours at the place in that behalf aforesaid, that thereafter said shorthand notes were by me transcribed on the typewriter as above set forth and said depositions were subscribed by said witnesses respectively in my presence at the times above certified to.

I certify that due notice a copy of which is hereto attached was given by defendant to complainant of the taking of these depositions and counsel defendant and complainant himself or his counsel were present at the taking thereof on each day; that I am not counsel attorney or relative of either party or otherwise interested in the event of this cause.

I have retained the said depositions in my possession for
444 the purpose of delivering the same with my own hand to the court in which said cause is pending, and said depositions are now herewith returned.

Given under my hand and notarial seal this 6th day of June, 1900.

My commission expires November 14th, 1902.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

Notary's fees (Orr & Fidler) $100.35 paid by defendant.

Witness fees: Annie L. Fraser, A. S. Marley, E. H. Phelps, William S. Woods, E. R. Crutcher, A. D. Beedle, Charles E. Finlay, G. L. Carney, Total $8.00

445 No. 7755.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Main street from the center line of Thirty-first street, or Springfield avenue, to the south line of Westport avenue, in said city, as provided by ordinance No. 1803, of said city, entitled, "An ordinance to pave Main street from the center line of Thirty-first street or Springfield avenue, to the south line of Westport avenue," approved by the mayor of said city on the 5th day of May, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 17th day of May, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $47.019.69 which sum has been by ordinance of said city numbered 1976, approved by the mayor of said city on the 5th day of October, 1897, duly levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 1 block 50 (south 15 feet), Hyde Park the sum of $66.54 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness my hand this 5th day of October, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

446 The back of said bill reads as follows:

Assignment.

—— —, 189–.

For value received — assign this special tax-bill and the lien thereof to —— —— and —— —— authorized to sign name to receipt.

—— ——.

N. B.—Any purchaser of this tax-bill will please notify the city clerk.

(The following is put on with a rubber stamp:)
This bill issued Oct. 21, 1897. G. L. Love, city clerk."

$66.54. No. 7755.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company, on account of paving Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue as provided by ordinance No. 1803. Approved May 5th, 1897.

Description of property: Lot 1 block 50 (S. 15 feet) Hyde Park.

Amount, $66.54.

Dated, October 5th, 1897.

Recorded 10-21-1897.

Page 136.

(Copy of rubber stamp:) G. L. Love, city clerk.

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered of the record.

447 No. 7756.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify, that the work or improvement of paving Main street from the center line of Thirty-first street, or Springfield avenue, to the south line of Westport avenue in said city, as provided by ordinance No. 1803 of said city, entitled, "An ordinance to pave Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue, approved by the mayor of said city on the 5th day of May, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 17th day of May, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $47.019.69 which sum has been by ordinance of said city numbered 1976 approved by the mayor of said city on the 5th day of October, 1897 duly levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit, lot 1 block 39, Hyde Park, the sum of $266.13, being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness my hand this 5th day of October, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy)

448 (The back of said bill reads as follows:—)

Assignment.

——, 189–.

For value received — assign this special tax-bill and the lien thereof to —— —— and —— —— authorized to sign name to receipt.

——.

N. B.—Any purchaser of this tax-bill will please notify the city clerk.

(The following is put on with a rubber stamp:)
"This bill issued Oct. 21, 1897. G. L. Love, city clerk."

"266.13. No. 7756.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company, on account of paving Main street from the center line of Thirty-first street, or Springfield avenue to the south line of Westport avenue as provided by ordinance No. 1803. Approved May 5th, 1897.
Description of property: Lot 1, block 39, Hyde Park.
Amount, $266.13.
Dated October 5th, 1897.
Recorded 10–21–1897.
Page 132.
(Copy of rubber stamp:) G. L. Love, city clerk.
NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered of the record.

449 No. 7757.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Main street from *teh* center line of Thirty-first street, or Springfield avenue, to the south line of Westport avenue, in said city, as provided by ordinance No. 1803, of said city, entitled, "An ordinance to pave Main street from the center line of 31st St. or Springfield avenue to the south line of Westport avenue, approved by the mayor of said city on the 5th day of May, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 17th day of May, 1897, has been completed according to the terms of the contract and ordinance and has been duly accepted

that the total cost of such work is $47,019.69 which sum has been by ordinance of said city numbered 1976 approved by the mayor of said city on the 5th day of October, 1897, duly levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 2, block 39, Hyde Park the sum of $221.77 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness my hand this 5th day of October, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

450 *Assignment.*

—— —, 189–.

For value received — assign this special tax-bill and the lien thereof to —— —— and —— —— authorized to sign — name to receipt.

—— ——.

N. B.—Any purchaser of this tax-bill will please notify the city clerk.

(The following is put on with a rubber stamp:)
"This bill issued Oct. 21, 1897. G. L. Love, city clerk."

$221.77. No. 7757.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company, on account of paving Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue as provided by ordinance No. 1803. Approved May 5th, 1897.

Description of property: Lot 2, block 39 Hyde Park.
Amount, $221.77.
Dated October 5th, 1897.
Recorded 10–21–1897.
Page 132.
(Copy of rubber stamp:) G. L. Love, city clerk.

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered of the record.

No. 8120.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify, that the work or improvement of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue in said city as provided by ordinance No. 1866 of said city, entitled "An ordinance to pave Baltimore avenue
451 from the south line of Hunter avenue to the north line of Westport avenue," approved by the mayor of said city on the 16th day of July, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 26th day of July 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $24.512.00 which sum has been by ordinance of said city numbered 2046, approved by the mayor of said city on the 18th day of November, 1897, duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 7, block 39, Hyde Park the sum of $141.96, being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Co., against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof at the rate of eight per cent. per annum.

Witness my hand this 18th day of November, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

——— —, 189–.

For value received — assign this special tax bill and the lien thereof to ——— ——— and ——— ——— authorize- to sign name to receipt.

——— ———.

452 N. B.—Any purchaser of this tax bill will please notify the city clerk.

(Then the following in rubber stamp:)
"This bill issued Nov. 20, 1897. G. L. Love, city clerk."
40—201

$141.96.

No. 8120.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company on account of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue as provided by ordinance No. 1866 Approved July 16, 1897.

Description of property: Lot 7 block 39, Hyde Park.

Amount $141.96. Dated November 18th, 1897. Recorded 11-19-1897. Page 132.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 8121.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue, in said city, as provided by ordinance No. 1866, of said city, entitled "An ordinance to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue," approved by the mayor of said city on the 16th day of July, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 26th day of July, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of
453 such work is $24,512.00 which sum has been by ordinance of said city numbered 2046 approved by the mayor of said city on the 18th day of November, 1897, duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 8, block 39, Hyde Park, the sum of $170.35 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is iss-ed in favor of the Barber Asphalt Paving Co. against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness my hand this 18th day of November, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

——, 189–.

For value received — assign this special tax bill and the lien thereof to —— —— and —— —— authorize- to sign — name to receipt.

—— ——.

N. B.—Any purchaser of this tax bill will please notify the city clerk.

(Then the following in rubber stamp:)
This bill issued Nov. 20, 1897. G. L. Love, city clerk.

"170.35. No. 8121.

454 *Special Tax Bill.*

City of Westport.

Issued to the Barber Asphalt Paving Company. On account of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue as provided by ordinance No. 1866. Approved July 16, 1897.
Description of property: Lot 8, block 39, Hyde Park.
Amount $170.35.
Dated November 18th, 1897.
Recorded 11–19, 1897. Page 132.
G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 8142.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Baltimore avenue, from the south line of Hunter avenue to the north line of Westport avenue in said city, as provided by ordinance No. 1866, of said city, entitled, "An ordinance to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue," approved by the mayor of said city on the 16th day of July, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 26th day of July, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $24.512.00 which sum has been by ordinance of said city num-

bered 2046 approved by the mayor of said city on the 18th day of November, 1897 duly levied and assessed as a special tax upon
455 all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 1, block 49, Hyde Park the sum of $280.00 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest aft-r thirty days from the date hereof at the rate of eight per cent. per annum.

Witness my hand this 18th day of November, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

—— —, 189-.

For value received — assign this special tax-bill and the lien thereof to —— —— and — authorize to sign name to receipt.

—— ——.

N. B.—Any purchaser of this tax bill will please notify the city clerk.

(Then the following in rubber stamp:)
"This bill issued Nov. 20, 1897. G. L. Love, city clerk."

$280.00.

No. 8142.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company. On account of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue as provided by ordinance
456 No. 1866. Approved July 16, 1897.

Description of property: Lot 1, block 49, Hyde Park.

Amount $280.00, Dated November 18, 1897. Recorded 11-19, 1897. Page 136.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 8143.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue in said city as provided by ordinance No. 1866, of said city, entitled, "An ordinance to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue," approved by the mayor of said city on the 16th day of July, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 26th day of July, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $24.512.00 which sum has been by ordinance of said city numbered 2046 approved by the mayor of said city on the 18th day of November, 1897, duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 2, block 50 (south 15.17 feet) Hyde Park. the sum of $43.07 being the amount that said lot or
457 tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness my hand this 18th day of November, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

—— —, 189–.

For value received — assign this special tax bill and the lien thereof to —— —— and —— —— authorize- to sign — name to receipt.

—— ——.

N. B.—Any purchaser of this tax bill will please notify the city clerk.

(Then the following in rubber stamp:)
" This bill issued Nov. 20, 1897. G. L. Love, city clerk."

$43.07. No. 8143.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company. On account of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue as provided by ordinance No. 1866. Approved July 16, 1897.

Description of property: Lot 2, block 50 (S. 15.17 ft.) Hyde Park.

Amount, $43.07. Dated November 18, 1897. Recorded 11-19, 1897. Page 136.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

458 No. 8134.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify, that the work or improvement of paving Baltimore avenue, from the south line of Hunter avenue to the north line of Westport avenue, in said city, as provided by ordinance No. 1866, of said city, entitled "An ordinance to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue," approved by the mayor of said city on the 16th day of July, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 26th day of July, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted, that the total cost of such work is $24.512.00 which sum has been by ordinance of said city numbered 2046, approved by the mayor of said city on the 18th day of November, 1897, duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 8, block 45 Hyde Park, the sum of $132.92 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness mt hand this 18th day of November, 1897.

459 H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

—— —, 189–.

For value received — assign this special tax bill and the lien thereof to —— —— and —— —— authorized to sign — name to receipt.

—— ——.

N. B.—Any purchaser of this tax bill will please notify the city clerk."

(Then the following in rubber stamp:)
"This bill issued Nov. 20, 1897. G. L. Love, city clerk.

$132.92. No. 8134.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company. On account of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue, as provided by ordinance No. 1866. Approved July 16, 1897.

Description of property: Lot 8, block 45, Hyde Park.

Amount, $132.92. Dated November 18, 1897. Recorded 11–19–1897.

Page 134.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 8135.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Baltimore avenue from the south line of Hunter avenue to the
460 north line of Westport avenue, in said city as provided by ordinance 1866 of said city entitled "An ordinance to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue," approved by the mayor of said city on the 16th day of July, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 26th day of July, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted that the total cost of such work is $24,512.00 which sum has been by ordi-

nance of said city numbered 2046, approved by the mayor of said city on the 18th day of November, 1897, duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit; lot 9, block 45, Hyde Park, the sum of $132.92, being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Co. against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness my hand this 18th day of November, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

—— —, 189–.

For value received — assign this special tax bill and the lien thereof to —— —— and —— —— authorized to sign — name to receipt.

—— ——.

N. B.—Any purchaser of this tax bill will please notify the city clerk."

461 (Then the following in rubber stamp:)
"This bill issued Nov. 20, 1897. G. L. Love, city clerk."

$132.92. No. 8135.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company on account of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue as provided by ordinance No. 1866, approved July 16, 1897.

Description of property: Lot 9, block 45, Hyde Park.

Amount $132.92.

Dated November 18th, 1897. Recorded 11–19, 1897. Page 134.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 8136.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue, in said city as provided by ordinance No. 1866, of said city entitled "An ordinance to pave Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue," approved by the mayor of said city on the 16th day of July, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 26th day of July, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $24.512.00 which sum has been by ordinance of said city numbered 2046, approved by the mayor of said city on the 18th day of November, 1897, duly levied and assessed as a special tax
462 upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 10, block 45, Hyde Park, the sum of $132.92 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Co. against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness my hand this 18th day of November, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

—— —, 189–.

For value received — assign this special tax bill and the lien thereof to —— —— and —— —— authorized to sign — name to to receipt.

—— ——.

N. B.—Any purchaser of this tax-bill will please notify the city clerk."

(Then the following in rubber stamp:)

"This bill issued Nov. 20, 1897. G. L. Love, city clerk."

41—201

$132.92. No. 8136.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company. On account of paving Baltimore avenue from the south line of Hunter avenue to the north line of Westport avenue as provided by ordinance No. 1866, approved July 16, 1897.

463 Description of property: Lot 10, block 45, Hyde Park.
Amount—$132.92.

Dated November 18th, 1897. Recorded 11–19, 1897. Page 134.
G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 7760.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Main street from the center line of Thirty-first street, or Springfield avenue, to the south line of Westport avenue, in said city, as provided by ordinance No. 1803 of said city, entitled "An ordinance to pave Main street from the center line of Thirty-first street or Springfield avenue, to the south line of Westport avenue," approved by the mayor of said city on the 5th day of May, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 17th day of May, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted, that the total cost of such work is $47,019.69 which sum has been by ordinance of said city numbered 1976, approved by the mayor of said city on the 5th day of October 1897 duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 1, block 45, Hyde Park, the sum of $232.23 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the
464 sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness my hand this 5th day of October, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

—— —, 189–.

For value received — assign this special tax bill and the lien thereof to —— —— and —— —— authorized to sign — to receipt.

—— ——.

N. B.—Any purchaser of this tax bill will please notify the city clerk."

(Then the following in rubber stamp:)
"This bill issued Oct. 21, 1897, G. L. Love, city clerk."

$232.23. No. 7760.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company. On account of paving Main street from the center line of Thirty-first street or Springfield avenue, to the south line of Westport avenue, as provided by ordinance No. 1803. Approved May 5th, 1897.

Description of property: Lot 1, block 45. Hyde Park.

Amount $232.23. Dated October 5th, 1897. Recorded 10–21–1897. Page 134.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 7761.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

465 This is to certify, that the work or improvement of paving Main street from the center line of Thirty-first street, or Springfield avenue to the south line of Westport avenue, in said city, as provided by ordinance No. 1803, of said city, entitled, "An ordinance to pave Main street from the center line of Thirty-first street, or Springfield avenue, to the south line of Westport avenue approved by the mayor of said city on the 5th day of May, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 17th day of May, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted, that the total cost of such work is $47,019.69 which sum has been by ordinance of said city numbered 1876 approved by the mayor of said city on the 5th day of October, 1897, duly levied and assessed as a special tax upon all the

lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 2, block 45, Hyde Park, the sum of $232.23, being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof at the rate of eight per cent. per annum.

Witness my hand this 5th day of October, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

Copy.

(The back of said bill reads as follows:)

466

Assignment.

——— —, 189–.

For value received — assign this special tax bill and the lien thereof to ——— ——— and ——— ——— authorized to sign — to receipt.

——— ———.

N. B.—Any purchaser of this tax bill will please notify the city clerk."

(Then the following in rubber stamp:)
"This bill issued Oct. 21, 1897. G. L. Love, city clerk."

$232.23.

No. 7761.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company. On account of paving Main street from the center line of Thirty-first street or Springfield —, to the south line of Westport avenue, as provided by ordinance No. 1803. Approved May 5th, 1897.

Description of property: Lot 2, block 45, Hyde Park.

Amount $232.23. Dated October 5th, 1897. Recorded 10–21–1897. Page 134.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 7762.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Main street from the center line of Thirty-first street or Springfield avenue, to the south line of Westport avenue, in said city, as provided by ordinance No. 1803, of said city, entitled, "An ordinance
467 to pave Main street from the center line of Thirty-first street or Springfield avenue, to the south line of Westport avenue," approved by the mayor of said city on the 5th day of May, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 17th day of May, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $47,019.69 which sum has been by ordinance of said city numbered 1976 approved by the mayor of said city on the 5th day of October 1897, duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 3, block 45, Hyde Park the sum of $232.23 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent per annum.

Witness my hand this 5th day of October, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

—— — 189–.

For value received — assign this special tax bill and the lien thereof to —— —— and —— —— authorized to sign — to receipt.

—— ——.

N. B.—Any purchaser of this tax bill will please notify the city clerk."

468 (Then the following in rubber stamp:)

"This bill issued Oct. 21, 1897. G. L. Love, city clerk."
$232.23

No. 7762.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company on account of paving Main street from the center line of Thirty-first street or Springfield avenue, to the south line of Westport avenue, as provided by ordinance No. 1803. Approved May 5th, 1897.

Description of property: Lot 3. Block 45. Hyde Park.

Amount $232.23; dated, October 5th, 1897. Recorded 10-21-1897. Page 134.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 7763.

Special Tax Bill of the City of Westport, in the County of Jackson State of Missouri.

This is to certify that the work or improvement of paving Main street from the center line of Thirty-first street, or Springfield avenue, to the south line of Westport avenue in said city, as provided by ordinance No. 1803 of said city, entitled "An ordinance to pave Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue," approved by the mayor of said city on the 5th day of May, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 17th day of May, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $47,019.69 which
469 sum has been by ordinance of said city numbered 1976, approved by the mayor of said city on the 5th day of October, 1897, duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit: lot 4, block 45, Hyde Park, the sum of $232.23 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear in-

terest after thirty days from the date hereof, at the rate of eight per cent. per anum.

Witness my hand this 5th day of October, 1897.

H. B. ABERCROMBIE,
Chief Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

——— —, 189–.

For value received — assign this special tax bill and the lien thereof to ——— ——— and ——— ——— authorized to sign — to receipt.

——— ———.

N. B.—Any purchaser of this tax-bill will please notify the city clerk."

(Then the following in rubber stamp:)
"This bill issued Oct. 21, 1897. G. L. Love, city clerk."

$232.23. No. 7763.

Special Tax Bill.

City of Westport.

470 Issued to the Barber Asphalt Paving Company. On account of paving Main street from the center line of Thirty-first street or Springfield avenue, to the south line of Westport avenue, as provided by ordinance No. 1803. Approved May 5th, 1897.

Description of property: Lot 4, block 45, Hyde Park.

Amount $232.23; dated October 5th, 1897. Recorded 10–21–1897. Page 134.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 7764.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Main street from the center line of Thirty-first street, or Springfield avenue, to the south line of Westport avenue, in said city, as provided by ordinance No. 1803, of said city, entitled, "An ordinance to pave Main street from the center line of Thirty-first street or Springfield

avenue to the south line of Westport avenue," approved by the mayor of said city on the 5th day of May, 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 17th day of May, 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $47,019.69 which sum has been by ordinance of said city numbered 1976, approved by the mayor of said city on the 5th day of October, 1897, duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said
471 ordinance there was levied and assessed as a special tax against the following described lot and larcel of land in said city, to-wit: lot 5, block 45, Hyde Park, the sum of $255.55 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness my hand this 5th day of October, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

—— —, 189-.

For value received — assign this special tax bill and the lien thereof to —— —— and —— —— authorized to sign — to receipt.

—— ——.

N. B.—Any purchaser of this tax-bill will please notify the city clerk."

(Then the following in rubber stamp:)
"This bill issued Oct. 21, 1897. G. L. Love, city clerk."

$255.55.

No. 7764.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company. On account of paving Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue, as provided by ordinance No. 1803. Approved May 5th, 1897.
472 Description of property: Lot 5, block 45, Hyde Park.

Amount $255.55, Dated October 5th, 1897. Recorded 10-21-1897. Page 134.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

No. 8200.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue in said city, as provided by ordinance No. 1931, of said city, entitled, "An ordinance to pave Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue," approved by the mayor of said city on the 3rd day of Sept., 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 11th day of Sept., 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $31.908.54, which sum has been by ordinance of said city numbered 2047, approved by the mayor of said city on the 18th day of November, 1897, duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to wit: lot 3, block 41, Hyde Park the sum of $172.68 being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax-bill is issued in favor of the Barber Asphalt Paving Company against the tract of land above described for the sum levied and charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

473

Witness my hand this 18th day of November, 1897.

H. B. ABERCROMBIE,
City Engineer of the City of Westport.

(Copy.)

(The back of said bill reads as follows:)

Assignment.

—— —, 189–.

For value received — assign this special tax bill and the lien thereof to —— —— and —— —— authorized to sign — name to receipt.

—— ——.

N. B.—Any purchaser of this tax bill will please notify the city clerk."

(Then the following in rubber stamp:)
"This bill issued Nov. 22, 1897. G. L. Love, city clerk."

$172.68.

No. 8200.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company. On account of paving Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue as provided by ordinance No. 1931. Approved Sept. 3, 1897.

Description of property: Lot 3, block 41, Hyde Park.

Amount $172.68. Dated November 18th, 1897. Recorded 11-19-1897. Page 132.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

474

No. 8201.

Special Tax Bill of the City of Westport, in the County of Jackson, State of Missouri.

This is to certify that the work or improvement of paving Wyandotte street, from the south line of Hunter avenue to the north line of Westport avenue, in said city, as provided by ordinance No. 1931, of said city, entitled, "An ordinance to pave Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue," approved by the mayor of said city on the 3rd day of Sept., 1897, and the contract for such work made by said city with the Barber Asphalt Paving Company, dated the 11th day of Sept., 1897, has been completed according to the terms of the contract and ordinance, and has been duly accepted; that the total cost of such work is $31.908.54, which sum has been by ordinance of said city numbered 2047 approved by the mayor of said city on the 18th day of November, 1897, duly levied and assessed as a special tax upon all the lots and pieces of land chargeable therewith according to law; that by the terms of said ordinance there was levied and assessed as a special tax against the following described lot and parcel of land in said city, to-wit lot 4, block 41, Hyde Park, the sum of $172.68, being the amount that said lot or tract of land is chargeable with to pay its proportional share of the cost of the work aforesaid.

This tax-bill is issued in favor of the Barber Asphalt Paving Co. against the tract of land above described for the sum levied and

charged against it as aforesaid, which sum shall bear interest after thirty days from the date hereof, at the rate of eight per cent. per annum.

Witness my hand this 18th day of November, 1897.

H. B. ABERCROMBIE,

475 *City Engineer of the City of Westport.*

(Copy.)

(The back of said bill reads as follows:)

Assignment.

—— —, 189–.

For value received — assign this special tax bill and the lien thereof to —— —— and —— —— authorized to sign — name to receipt.

—— ——.

N. B.—"Any purchaser of this tax bill will please notify the city clerk."

Then the foll-ing in rubber stamp: This bill issued Nov. 22, 1897. G. L. Love, city clerk.

$172.68. No. 8201.

Special Tax Bill.

City of Westport.

Issued to the Barber Asphalt Paving Company. On account of paving Wyandotte street from the south line of Hunter avenue, to the north line of Westport avenue, as provided by ordinance No. 1931. Approved Sept. 3, 1897.

Description of property: Lot 4, block 41, Hyde Park.

Amount $172.68. Dated November 18th, 1897. Recorded 11–19–1897. Page 132.

G. L. LOVE, *City Clerk.*

NOTE.—This bill should be presented at the city clerk's office when receipted to have satisfaction entered on the record.

476 EXHIBIT No. 101. Alfred Fidler, Notary Public, Jackson Co., Mo.

Form 8.

1.

Journal Voucher.

The Barber Asphalt Paving Co.

Nov. 30, 1897. Chg. tax liens—

Wyandotte H. W..	31908.72	39353 20
Campbell, 31–32...	3025.39	
Locust, T. P., 33...	1356.80	
Harrison, 31–32...	3062.29	

Cr. City of Westport 39353.20

For special tax bills as follows:—

Wyandotte H. W. dated Nov. 18–1897.
Campbell, 31–32, " " 23 "
Locust, T. P., –33, " " 16 "
Harrison 31–32, " " 27 "
Notice of shipment No. —.
Private work report No. —.
Repair report No. —.
Advice of entry No. 15.

Exhibit 101. Copy.
——, 1.

E. B. PECK, *Cashier.*

477 *Journal Voucher.*

City of Westport, Mo.

No. 48.

Date, Nov. 30, 1897.

For tax bills rec'd:

Wyandotte H. W.....	31908.72
Locust, T. P. –33.....	1356.80
Campbell, 31–32	3025.39
Harrison, 31–32	3062.29

Account.	Charge.	Credit.
Cash		
Plant		
Grade		
Base		
Binder		
Surface		
Extra work		
Expense		
Repairs		
Maintenance A		
Maintenance B		
Private work		
Private work—repairs		
Acc'ts receivable		
Extra expense		
Depreciation		
Refining		
Tax liens	39353.20	
City of Westport		39353 20
The B. A. P. Co.		

478 EXHIBIT 100. Alfred Fidler, Notary Public, Jackson Co., Mo.

Form 8.

1.

Journal Voucher.

1. The Barber Asphalt Paving Co.

Nov. 30, 1897. Chg. tax liens..... 24511 83
Cr. City of Westport..... ..... 24511 83

For special tax bills dated Nov. 18–1897.
Rec'd for paving Baltimore Ave.—H–W.
Notice of shipment No. —.
Private work No. —.
Repair report No. —.
Advice of entry No. 13.

Exhibit 100. Copy.
—— 1

—— ——, *Cashier.*

479–506

City of Westport, Mo.

No. 42.

Date, Nov. 30, 1897.

For special tax bills

Rec'd Baltimore Ave., H–W.

Account.	Charge.	Credit.
Cash		
Plant		
Grade		
Base		
Binder		
Surface		
Extra work		
Expense		
Repairs		
Maintenance A		
Maintenance B		
Private work		
Private work—repairs		
Acc'ts receivable		
Extra expense		
Depreciation		
Refining		
Tax liens		
City of Westport	24511 83	
The B. A. P. Co		24511 83

* * * * * * *

507 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant. } No. —.

Depositions.

UNITED STATES OF AMERICA,
State of Missouri, County of Jackson, } ss:

Depositions of witnesses, produced, sworn and examined on the 8th and 9th days of May, 1900, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of said days, at the law office of Richard H. Field, 1020 New York Life building, Kansas City, Jackson county, Missouri, before me, Alfred Fidler, a notary public within and for Jackson county, Missouri, in a certain cause now pending in the circuit court of the United States for the western division of the western district of Missouri, at Kansas City, between Richard H. Field, complainant, and The Barber Asphalt Paving Company, defendant, taken in rebuttal on the part of the complainant.

Appearances.

Complainant appeared personally in his own behalf.
Messrs. Scarritt, Griffith & Jones appeared for defendant.

At this point it was agreed by and between party complainant and counsel for party defendant to this action that these depositions be taken in shorthand by Alfred Fidler, and be by him transcribed on the typewriter and when thus transcribed that they be subscribed by the respective witnesses and when thus subscribed that they be of the same force and effect as if they had been taken in longhand and subscribed by the respective witnesses immediately after the taking of the same.

And the said witnesses, each one of them being of lawful age and having been by me first cautioned and sworn to tell the truth the whole truth and nothing but the truth, in the matter in controversy aforesaid, I did with the assistance of counsel, carefully examine the said witnesses and they did thereupon depose and say, respectively, as follows:

508 It is stipulated by and between the parties to this cause that the complainant shall have until the 25th day of March, 1900, to take testimony in support of his bill, and that the defendant shall have until the 1st day of May, 1900, to take testimony on its part, and that thereafter the complainant shall have until May 9th, 1900, to take testimony in rebuttal.

G. L. LOVE, of lawful age, being produced, sworn and examined on the part of the complainant, in rebuttal, deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. You are the same person who has heretofore given a deposition in this cause on behalf of the complainant?

A. Yes sir.

Q. And you testified that you were city clerk of Westport at and before the date of its consolidation with Kansas City?

A. Yes sir.

Q. Who registered the tax bills in question issued for the paving of Baltimore avenue and Wyandotte street, if you remember?

A. I began the registration of the Wyandotte Street bills and registered a portion of them and the work was completed by a young man named Merrill.

Q. That is the remainder of the Wyandotte Street bills and the Baltimore Avenue bills were registered by Mr. Merrill?

A. Yes. I may have registered some of the Baltimore Avenue bills but I do not remember, but I am pretty sure I registered some of the Wyandotte bills.

Q. Most of the Baltimore Avenue and Wyandotte bills were registered by Mr. Merrill?

A. Yes sir.

Q. Do you remember the number of days Mr. Merrill worked at that?

A. I do not remember. He was in the office with me about a week assisting me for about one week, but he registered other bills too.

Q. Have you a receipt that would show when he quit or
509 how much you paid him?

A. Yes, sir.

Q. I would like to have that. What is the date of that receipt?

By Mr. GRIFFITH: Put in the objection there that this testimony is irrelevant and immaterial.

By Mr. FIELD:

Q. Will you read the receipt in evidence.

Counsel for defendant makes same objection as just above and the receipt is also incompetent.

A. " December 7th, 1897,——

By Mr. GRIFFITH: Will you let me see that receipt? (Witness hands receipt to Mr. Griffith.)

A. "—Received of G. L. Love ex-city clerk of Westport $9.75 for clerical services on special tax register, etc., A. M. Merrill."

By Mr. GRIFFITH: I have one further objection to the testimony. The same was gone into on testimony in chief of complainant and it is not proper evidence in rebuttal.

By Mr. FIELD:

Q. Now was the date of that receipt the last day that he worked there?

A. No, I think it was a day or two afterwards, that is the second

day afterwards perhaps, I do not know,—I am not positive on that point.

Q. It may have been the same day?

A. I think not. I think it was at least the day after.

Q. How many days did you work there altogether?

A. I would say six days and a half as $1.50 a day was what I was to pay him.

Q. Six days and a half?

A. Yes sir.

Q. Well if he began there on the first day of December and worked six days and a half the date of that receipt would
510 be the day that he quit work there, would it not?

Counsel for defendant objects to the question as leading and suggestive to the witness.

A. Yes.

Q. What day of the week did the extension occur, or do you remember?

A. I think it was Thursday.

Q. Thursday, December 2nd, 1897?

A. I think it was Thursday.

Q. And there was a Sunday then intervening between the 2nd and the 7th?

A. Yes.

Q. Now was there any kind of a register or entry book kept in the office of the city engineer of a list of tax bills that he signed?

By Mr. GRIFFITH: Objected to as asking what the book shows when the book itself is the best evidence.

A. The engineer had what was known as the final estimate book, which carried a full list of all tax bills made out, the amount of each bill and the property it was issued against.

By Mr. GRIFFITH: I object to the witness stating what the book shows as the book itself is the best evidence, and ask to have the answer stricken out.

By Mr. FIELD:

Q. Did you have anything to do with that book?

A. No sir.

Q. What was the city engineer's practice as to making lists of the tax bills in that book as to time,—was it done before the tax bills came to you for registration or you issuing the tax bills, or afterwards?

Counsel for defendant object to the question as incompetent, irrelevant and immaterial and because the witness has already
511 testified he did not know anything about it. I object to it for the further reason that he has not shown that the witness is familiar with the practice of the city engineer.

A. The way I understand was the final estimate was made in this book before the tax bills were written.

Counsel for defendant objects to the witness testifying what his understanding was and asks to have the answer stricken out.

Q. I ask you as to your knowledge then as to when tax bills were registered in this register. Was it before or after the city engineer signed the tax bills?

A. I would say that that was before. It was the final estimate of the work done. The total frontage or yardage was made up and the amount against each piece of abutting property. That was for the purpose of enabling the clerk to write the tax bills.

Q. The clerk of who?

A. The engineer's clerk.

Q. You do not mean to enable you?

A. No sir, I did not write tax bills.

Q. The tax bills came to you written out?

A. Yes sir.

Q. And the register of the tax bills was made before they were signed by the engineer?

A. Well I don't know,—the clerk did that.

Q. Who was the clerk to the city engineer that entered the amounts of these tax bills and the piece of property against which they were issued at the time you speak of?

A. I could not state as to that. I think the tax bills were all written by Mrs. Mixter, she has married since and is now Mrs. Fraser.

Q. Did she have anything to do with the entering of these tax bills in this book in the engineer's office that you speak of?

A. I do not know, I could not tell that.

Q. I understood you to say that the clerk to the city engineer wrote these matters in the estimate book?

512 A. No, that estimate book was to enable the clerk to write the tax bills. The clerk took the estimate book and wrote the tax bills in accordance with it, but as to who wrote up that estimate I do not know. It was done by the engineer himself sometimes and sometimes others in the office, sometimes the draughtsman.

Q. If Mrs. Fraser wrote any of the tax bill register that you speak of was it on this tax bill register in the engineer's office or this one in your office?

A. I do not think she wrote anything in that register in my office.

Q. Did she have anything to do with registering the tax bills on Baltimore avenue or Wyandotte street?

A. I do not think she did in my office.

Q. I mean as to the registration of these tax bills?

A. In my office?

Q. Yes.

A. I do not think she had anything to do with it.

Q. Your impression is that what you did not register was registered by this young man Merrill?

Counsel for defendant objects to the witness stating his impression.

Q. Well is that your recollection?
A. That is my recollection.
Q. Do these tax bills on the back have your name at the bottom after the statement or memorandum?
A. Yes sir.
Q. All of that memorandum (showing witness tax bills for Baltimore avenue in question) was that put on by persons in your office, or was part of it put on by some one in the engineer's office?
A. The only thing put on in my office was "Recorded 11–19–1897 page 132 G. L. Love, city clerk." That was the only part that was put on in my office.
Q. On the back of the tax bill in question.
A. Yes sir.
Q. The only difference in the one I show you and the others is the date it was recorded in the record?
A. Yes sir.
Q. The day of the month would be in writing?
A. Yes sir.
513 Q. The word "page" is printed?
A. Yes sir.
Q. The word "recorded" is printed?
A. Yes sir.
Q. "132" was put in by the clerk in your office?
A. Yes sir.
Q. Now that same statement is true, I suppose, as to the indorsements on all of these tax bills?
A. Yes sir.
Q. The indorsement above the one you have indicated was a memorandum made in the office of the city engineer?
A. It came with the tax bills.
Q. Now when did you stamp your name down below that memorandum and the other stamp on the back of the bill "This bill issued" giving the date, and sign your name?—was that before or after it was registered by the clerk in your office?

Counsel for the defendant objects because the bill itself shows the date it is stamped and registered and the question calls for secondary evidence.

A. I always signed them after the registration was completed.
Q. Stamped them too after that?
A. Yes.
Q. You may take the witness.

Cross-examination by Mr. GRIFFITH:

Q. Did you have a clerk in your office?

A. Only for a few days in closing up business.

Q. That is Mr. Merrill you refer to?

A. Yes sir. For a few days I had another young man at work, but he did not go to work on the tax bill register.

Q. This memoranda "Recorded 11-/9-1897,"—do I understand that is the date of the registration?

A. Well it generally was. Sometimes it would vary. I think I stated here before we took the date of the approval of the ordinance making the levy and used that date generally for issuing date.

Q. Well that refers to the book and page of that tax bill register, does it not?

A. Yes sir.

514 Q. And as I understand you you stamped on the backs of the bills "This bill issued November 27/97, G. L. Love, city clerk" after they were registered?

A. Yes sir.

Q. That is a Wyandotte bill I am talking about now. The bills which I hold in my hand are bills for paving Wyandotte street. On the Baltimore Avenue bills there is stamped on the back "This bill issued November 20, 1897,"—as I understand those were the stamps that were put on there after the bills were registered?

A. After they were registered.

Q. Do I understand you to say that Mrs. Mixter sometimes helped register the bills?

A. No sir, I do not think she ever did any work on my register at all.

Q. What was it you said she helped you to do?

A. She helped me on records. The work she did in my office was nearly altogether on the ordinance record.

Q. Now the receipt signed by Mr. Merrill dated December 7th,—I understand you to say that was given a day or two after he finished?

A. I think it was at least the next day.

Q. Now there were numerous other bills on various other street that he assisted in registering, were there not?

A. Yes sir.

Q. A lot of reissued bills, were there not?

A. Yes.

Q. I believe that is all.

Re-direct-examination by Mr. FIELD:

Q. Doctor I want to ask a question. You remember when I examined you before I introduced in evidence the resolution declaring the work necessary, the ordinance ordering the work, the ordinance approving the contract and the ordinance levying the assessments on each of these streets?

A. Yes, sir.

Q. What other action was taken by the board of aldermen concerning each of these streets except what is contained in those

515 ordinances and resolutions to which I have called your attention?

Counsel for the defendant objects to the question as not proper rebuttal testimony, incompetent, irrelevant and immaterial.

A. There had been previous ordinances providing for establishing grades and curbing, of course.

Q. I mean in respect to the work ordered on these three streets in the contracts in question.

A. That is for the paving?

Q. For the work in question. What other action was taken by the aldermen except as expressed in the ordinances and resolutions to which I have called your attention?

Counsel for defendant makes same objection as just above.

A. I do not remember anything else.

Q. Was there anything else?

A. Not that I know of.

Q. Isn't that a matter about which you can be positive one way or another?

A. Well I believe I said once before those matters of record I do not bother myself to carry them, but I am almost positive there was no other action. The record would show if there was.

Q. You undertook when you copied these resolutions and ordinances to copy everything that had been done by the board of aldermen in connection with these three streets and the paving of them in connection with these contracts that were let?

Counsel for defendant makes same objection as just above.

A. Yes sir.

Q. Concerning the work that was ordered therein?

Counsel for defendant objects to all these questions as incompetent, irrelevant and immaterial and not being proper in rebuttal.

A. Yes sir.

Q. Was there any other ordinance or any other resolution on the subject of either of these pavements, or concerning the
516 work in question except these to which I have directed your attention?

Counsel for defendant makes same objection as just above.

A. Not in connection with these contracts.

Q. Or this work, this particular work?

(Same objection.)

A. Or these tax bills.

By Mr. GRIFFITH: It is a matter of record and the record itself is the best evidence.

By Mr. FIELD: I simply want to prove the negative fact whether there was or was not.

Q. As I understand you these resolutions and ordinances concerning those three streets, which you have copied and furnished, are all of the resolutions and ordinances concerning the work in question and letting the contract therefor?

(Same objection.)

A. That is my recollection, yes sir.

Q. How long were you city clerk of Westport?

A. I think it was about 10 years or somewhere in that neighborhood.

Q. Do you mean consecutively preceding the consolidation of Kansas City?

A. Yes sir, the only exception was the extension made in 1889 which was declared invalid in 1891. Of course I was not in office during that time actively.

Q. You were consecutively city clerk then for what time before it was consolidated with Kansas City?

A. I think I was elected in 1887 or 1888 and I was city clerk from that time, the only city clerk Westport had until its consolidation with Kansas City in 1897.

Q. You were the only city clerk Westport ever had from that time until it was consolidated with Kansas City in 1897?

A. I think it is from 1887, yes sir.

517–525 Re-cross-examination by Mr. GRIFFITH:

Q. I will ask you if after these bills were registered and taken by Mr. Peck to the office of the Barber Asphalt Paving Company in Kansas City they were ever returned to you for any purpose?

A. No sir.

Re-direct-examination by Mr. FIELD:

Q. After you let those bills go out of the office to Mr. Peck representing the Barber Asphalt Company they were not again in your office there, the Baltimore Avenue or Wyandotte bills?

A. No sir, unless they were presented for release.

Q. I mean they were not there in a bunch?

A. No sir.

Q. If they were presented for release it was by some property owner who paid them?

A. Yes sir.

Q. Do you remember any payments on these Baltimore Avenue or Wyandotte bills before you turned over the books?

A. I am not positive but I think I did release some of them.

Q. You are not positive, you may be mistaken?

A. No, I may be mistaken. I know there were a number of people who had paid tax bills and had not had them released and they brought them out and had me release them so there would be no hitch down here.

Q. That was after the extension?

A. Yes sir.

Q. You were keeping office there for some days after the extension, were you not?

A. Yes sir, for Kansas City, representing Kansas City with Westport work.

G. L. LOVE.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this 15th day of June, A. D. 1900.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

* * * * * * *

526 Not being able to complete the taking of these depositions on this day on account of the absence of other witnesses whose depositions the complainant was desirous of taking, by and with the consent of the parties complainant and defendant to this action, I adjourn the further taking of these depositions until tomorrow, then to be resumed at the same place and within the same hours mentioned in the annexed notice.

Given under my hand and notarial seal May 8th, 1900.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

Pursuant to adjournment as above stated, on this 9th day of May, 1900, at the same place mentioned in the caption hereof and between the same hours, counsel for the parties complainant and defendant to this action being in attendance, I resumed the taking of these depositions as follows:

527 R. H. FIELD, of lawful age, being produced, sworn and examined in his own behalf as complainant in this action, deposeth and saith as follows:

A. On the question of benefit to property on account of the pavements in question and the market value of the same I wish to say this, that I do not consider that there has been any market value for real estate in that district since August, 1887. The only disposition of property that I have known of in that location or in any other residence district in Kansas City up to within two or three years ago has been where some person wanted to build a house and desired a particular lot and in that way the owner of the property was able to command something like what it was worth, or he thought it was worth, and in other instances where there were forced sales, which were far more numerous than the previously mentioned character of sales. There has been a depression, you might say a dead market for real estate, except in the manner that I have stated, from August, 1887, the time of the so-called boom in Kansas City, down to within two years ago.

Within the past two years I think that there has been a steadier better feeling in real estate throughout the city. Up to that time

the deeds of trust that were made in the speculative period here had not all been foreclosed as I believe. I do not see how the benefit to this property and its market value can be estimated or stated when there has been no market and no scale of prices per lot or per front foot during the time that I have named; until within two years ago, at the farthest two and a half years ago, from about 1889, I do not believe there were ten residences built in all Kansas City's residence district that cost ten thousand dollars each. I do not believe there were 25 residences constructed between 1889 and 1897 that cost $7500.00 each and I do not be-
528 lieve there were 50 residences built from 1889 to 1897 costing $5000.00 each. Not only from 1887 to 1897 was there a depressed state in the market of real estate or improvement of real estate, but within the past three years real estate has not increased in value to what the owners think it ought to be worth, or ought to have been worth, while our special taxes have been continuous and on the increase. We have had not only these pavements in the outlying districts but we have had all manner of special improvements, parks containing one hundred to two hundred acres have been condemned and the cost assessed as special taxes, and we have had additional laws passed in Kansas City allowing them to levy a maintenance tax throughout the district without reference to the fact whether the property assessed fronts on the improvements or not, some of the property two miles away from the improvement,—so that whatever increase Kansas City has had in the past two years is due to the general condition in other matters being better. We hope we are now on the up-grade, but the market is not yet such a market as we would call a market value for real estate.

I desire to state that out of the seventeen lots described in the bill in this case I have not had inquiries from any proposed purchaser for exceeding three of those lots within the past ten years. I sold two lots whereon the Baptist church mentioned in the testimony of defendant was constructed in 1889, nearly two years after the so-called boom, for fifty-five dollars a foot all cash, and there wasn't a pavement, no curbing or even sidewalks except maybe a wooden sidewalk in front of the property, and I have not during my knowledge of the history of property in that district known it to sell so cheaply as it has within the past two years. I bought lots one and two, seven and eight, block 39 Hyde Park, described in this bill in May I think, 1889, May or June,—I think it was May, and I then paid I think it was nine thousand dollars for
529 those lots. There is a frontage of 110 feet on Baltimore avenue and 110 feet on Main street. This purchase was made by me eight years before the pavements in question. There was a lot on Main street, lot number four, block 39, fifty feet south of the lot I have just named, that during this year was purchased for forty dollars a foot and can be bought for that sum to day from the present owner. It belongs to a son of A. M. Allen of Westport and I had it offered to me day before yesterday.

The topography of the ground on these three streets is quite vary-

ing. On Main street north of 36th the ground is very high and sightly. At 36th and 37th the lots on either side of the street are below grade. On the northeast corner of 37th and Main street the lot recedes from the street to a depth below the surface of the street of ten to fifteen feet. From 37th to 38th street the ground lies pretty well, on grade and slightly above grade. From 38th to 39th the property does not lie so well as between 37th and 38th. The property from 39th to Westport avenue is above grade and would be very nice for residence purposes but for the car barn on which the same fronts.

The ground on Baltimore avenue, some of it lies above grade and some of it below grade. It runs parallel with Main street, Baltimore avenue does, and the same draws that run through Main street run through Baltimore avenue, but I do not believe quite so much below grade. North of 36th street on Baltimore avenue to 33d street the property lies pretty well and nice and high. The same is true I believe on Wyandotte street. It is mostly vacant, however, in that district, nearly all vacant. On Main street I think there are 196 lots fifty feet and over fronting thereon. On these 196 lots, fine houses and shanties included,——

By Mr. SCARRITT: We object to that. These are subjects gone into on examination in chief and it is not proper rebuttal
530 testimony, incompetent, irrelevant and immaterial, being contrary to the stipulation entered into between the parties and I move to strike out all the testimony in this examination for these reasons.

A. There are 45 houses on both sides of Main street on the total of 196 lots. There are 156 lots on Wyandotte street on the pavement in question and thereon there are 52 houses. On Baltimore avenue there are between 150 and 156 lots and 45 houses. I have given the number of houses there are there to day.

Something was said in the testimony of defendant about Main street and Wyandotte street being dusty when it was dry and muddy when it was wet. Now that is true so far as the macadam that was put down by the county court is concerned before this territory was taken into Westport, but it is not true as to the macadam that had been laid by Westport on Main street or on Wyandotte street. There is dirt on these asphalt streets and it is brought in from dirt roads by the travel and there is mud on these asphalt streets when it rains and there is dust there when it is dry, and that is true not only there but down town except where there is sprinkling to keep down the dust and where the streets are swept. That is all. I desire to say this, that I am willing to extend the time and give defendant three days' time to rebut any testimony I have given here.

By Mr SCARRITT: This testimony is objected to because it is not proper evidence in rebuttal and because it is the mere conclusion and argument of an interested party. As to the giving of time, he

knows under the rules we have not the opportunity to procure wit
nesses or produce testimony to contradict the statements.

By Mr. FIELD: I am willing to extend any time the gentle
531 man wishes to take testimony to rebut any testimony h
deems not proper rebuttal testimony. However, I deem
everything I have said as proper rebuttal testimony.

Cross-examination by Mr. SCARRITT:

Q. You have purported to state your opinion as to the number o
buildings erected in Kansas City during the ten or twelve years
from 1887,—I will ask you if before testifying in regard to that sub
ject you took the occasion to look over the records in the building
inspector's office and see what the records show in that regard?

A. No, I did not. I will state this, that what I have said is a
mere opinion, but it is based on a very close observation of what I
have seen in Kansas City. I have property not only in the location
in question but in old Kansas City limits.

Q. Have you noticed that the newspapers during this period have
at the end of every year and oftentimes at intervals during the year,
published statements that showed several million dollars were
annually expended in the erection of such improvements as you
have referred to.

A. No sir, I have not. There may have been a great deal of im-
provement within the last two years, or two years and a half, but I
was speaking of prior to that time.

Q. I will ask you if you have not known that the newspaper re-
ports show monthly that conveyances of real estate have been made
during each month aggregating a million dollars or more?

A. No sir, I do not believe that to be true.

Q. I will ask you to state if it is not the general opinion among
our own citizens and citizens of other localities who visit us, that
our city is one of the most prosperous cities in the United States?

A. Well I hear a great deal of talk about prosperity. It is in
other lines than those I am engaged in if it exists.

Q. I will ask you to state if it is not generally conceded that the
development in the old Hyde Park district, that is outside of
532 Westport, has in the last eight years been remarkable?

A. There has been nothing done out there until in the
last two years and a half.

Q. Was Mr. Meyer's house put up in the last two years and a
half?

A. I think it was.

Q. Wasn't it put there three or four years ago?

A. It may have been. I do not know that.

Q. Wasn't Warwick boulevard built up four or five years ago?

A. It is not built up yet.

Q. Isn't Warwick boulevard built up as much as any other resi-
dence street in the city?

A. No sir, I do not think so.

Q. I will ask you if Forest avenue has not been built up in the last five or six years?
A. I will say there has been a great deal of building there.
Q. It is an asphalt street?
A. Yes sir.
Q. Main street is an asphalt street?
A. Yes sir, it is built up on 45 lots.
Q. Some of the residences occupy a block of ground?
A. Mastin's.
Q. Well Mr. Keith's occupies practically a block?
A. No he does not. That is a very large long block. I can give you the number of lots in that block if I had a plat.
Q. T. W. Jones has a magnificent stone residence to the west of your lots hasn't he?
A. Over on Broadway two blocks west and three blocks north.
Q. It cost seventy-five thousand dollars?
A. It is a very expensive house.
Q. Mr. John Perry has a fine house in that neighborhood?
A. That has been put up in the last two years.
Q. Mr. W. A. Rule has a fine house in your neighborhood?
A. That has been put up in the last two years. There have been a great many put up within two years and a half, but this
533 lack of develpment I spoke of was before two years and a half ago.
Q. Mr. Mastin had a very fine residence out there?
A. Yes sir.
Q. He petitioned for this work, did he not?
A. Yes sir, I understand his name is on that petition I put in evidence. I understand the circumstances under which he put it on there if you want it.

R. H. FIELD.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this the 20th day of June, 1900.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

GEORGE L. LOVE, of lawful age, being produced, sworn and examined as aforesaid, recalled in rebuttal on the part of the complainant, further deposed and saith as follows:

Direct-examination by Mr. FIELD:

Q. Something was said here about dust on Main street and Wyandotte street and the macadam out there,—I will ask you where the dust was, what part of the macadam the dust came from on Main street?
A. Well the most of it I knew and heard of was on Main street north of Thirty-ninth.

Q. Was that where the county court put in the macadam?
A. Yes sir.
Q. The part of Main street that was macadamized by the city of Westport, and Wyandotte street that was macadamized by the city of Westport, was that dusty like the macadam put in by the county court?
A. Not so much.
Q. Was there mud on these streets where the city of Westport put down the macadam afterwards any more than on asphalt streets?
A. Well I don't know that there was unless it was washed down from the sides and from cross streets; after the asphalt was
534 put down some of the side streets were paved, 35th and 36th and that kept some of the wash from it.
Q. That came from the lots adjoining?
A. Yes sir.
Q. Dirt streets are used in connection with these streets by the travelling public?
A. Yes sir.
Q. That is the terminus of asphalt pavements in question on Baltimore avenue and Wyandotte street and Main street?
A. I do not understand.
Q. I say the terminus of the asphalt pavements running out the streets in question is at the terminus of the streets in question?
A. Yes sir, on these three streets.
Q. Westport avenue is the south boundary of these streets?
A. Yes sir.
Q. And after that you go on dirt roads?
A. Yes sir, on south.
Q. South of Westport avenue there are dirt roads and macadam roads?
A. Yes sir.
Q. That is all.

By Mr. SCARRITT: All the testimony of this witness is objected to as being not proper rebuttal evidence and for the reason that it is incompetent irrelevant and immaterial and defendant moves to strike it out for the reasons stated.

Cross-examination by Mr. SCARRITT:

Q. This macadam was made out of the native limestone, was it not?
A. Yes sir.
Q. Was it the same quality that Westport avenue was made out of?
A. That on Wyandotte street I think was taken from the same quarry.
Q. It is universally conceded that the wheels of vehicles and hoofs of horses break up this native macadam and it wears it and there is dust and mud from the action of traffic and climate?

535 A. Well that is the general opinion.
Q. That is all.

Re-direct-examination by Mr. FIELD:

Q. Was there anything wrong with this macadam on Wyandotte and Main street that was put in by Westport?
A. I never saw anything.
Q. If it had been swept and sprinkled it would have been just as good for traffic purposes as the asphalt street, would it not?
A. For general purposes, yes. I do not know that I am competent to pass on the question of roads. That is a matter of opinion anyway, largely. There are very strong arguments in favor of macadam over asphalt and *vice versa*,—it is a matter of taste.

By Mr. SCARRITT:

Q. You taste the macadam more than you do the asphalt, don't you Doctor?
A. Well unless you keep the macadam clean.

G. L. LOVE.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this 15 day of June, 1900.

ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

UNITED STATES OF AMERICA,
State of Missouri, County of Jackson, } ss:

I, Alfred Fidler, a notary public within and for Jackson county, State of Missouri, do certify that in pursuance of the annexed notice came before me at the law office of Richard H. Field, 1020 New York Life building, Kansas City, Jackson county, Missouri, G. L. Love, A. M. Merrill and Richard H. Field, who were by me severally sworn to testify the truth the whole truth and nothing but the truth touching the matter in controversy aforesaid; that they were examined and their examinations reduced to writing by myself in shorthand in the presence of the witnesses respectively, on
536 the days, within the hours at the places in that behalf first aforesaid; that thereafter said shorthand notes were by me transcribed on the typewriter as above set forth and said depositions were subscribed by said witnesses respectively in my presence at the times above certified to.

I certify that due and legal notice was given to defendant by complainant of the taking of these depositions and counsel for defendant were present at the taking thereof; that I am not of counsel, attorney or relative of either of the parties in the caption named, nor in any way interested in the event of this cause.

I have retained the said depositions in my possession for the purpose of delivering the same with my own hand to the court in

which said cause is pending, and said depositions are now herewith returned.

Given under my hand and notarial seal this 13th day of September, 1900.

My commission expires November 14th, 1902.

[SEAL.] ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

Notary's fees (Orr & Fidler), $16.05.

Witness fees:

G. L. Love, 3 days, $3.00, paid by complainant.
A. M. Merrill, 1 day, paid by complainant, $1.00.

537 In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

RICHARD H. FIELD, Complainant,
vs.
BARBER ASPHALT PAVING COMPANY, Defendant.

Deposition of a witness produced, sworn, and examined on the 8th day of June, 1900, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of said day, at the law office of Richard H. Field, 1020 New York Life building, Kansas City, Jackson county, Missouri, before me, John M. Orr, a notary public within and for Jackson county, Missouri, in a certain cause now pending in the circuit court of the United States for the western division of the western district of Missouri, at Kansas City, between Richard H. Field, complainant, and The Barber Asphalt Paving Co., defendant, on the part of the complainant.

Complainant appeared personally in his own behalf.
Scarritt, Scarritt, Griffith & Jones appeared for the defendant.

At this point it was agreed by and between party complainant, and counsel for the defendant to this action, that the deposition hereinafter set forth shall be written down in shorthand by the notary public aforesaid, and be by him transcribed on the typewriter and when thus transcribed that same be subscribed by said witness, and when thus subscribed that it shall be of the same force and effect as if it had been taken down in longhand and subscribed by the witness immediately after taking the same. And the said witness being of lawful age, and having been by me first cautioned and sworn to tell the truth, the whole truth and nothing but the truth in the matter in controversy aforesaid,

538 I did with the assistance of counsel, carefully examine the said witness, and he did thereupon depose and say as follows:

GEORGE L. LOVE of lawful age, being produced, sworn and examined on the part of the complainant, in rebuttal, deposeth and saith as follows:

Direct examination by Mr. FIELD:

Q. You are the same George L. Love who has heretofore given your deposition on several occasions in this case, are you not?

A. Yes sir.

Q. And the same George L. Love who has been city clerk of Westport?

A. Yes sir.

Q. For ten years preceding the consolidation of the city of Westport with Kansas City?

A. Yes sir, about that length of time.

Q. Did you record the ordinances and resolutions of the board of aldermen of the city of Westport during your term as city clerk?

A. Well yes sir I did, unless there was a few at the time of the consolidation that had not been entered up, and were turned over to Kansas City, and have been entered since that time.

Q. What months were they passed in?

A. The larger part of them in the month of November 1897.

Q. Well all ordinances that were passed, and resolutions that were adopted before November 1897 were entered up by you in the ten years preceding that time were they not?

A. Yes sir, I think practically all were entered up before that time.

Q. Are you familiar with the ordinances and resolutions that were passed and adopted on the subject or matter of improvements on Main street, Baltimore avenue and Wyandotte street?

A. Yes sir.

Q. Do you remember that in taking the previous deposition of yours in this case, that I introduced in evidence a resolution declaring the work necessary and ordinance ordering the work, and
539 an ordinance approving the contract, and also an ordinance levying the assessments against the property fronting on the streets mentioned for the pavement in question?

A. Yes sir.

Q. I will ask you what other action was had or taken by the board of aldermen of the city of Westport in respect to the work in question on the three streets in question, besides the resolutions and ordinances previously offered in evidence in this case?

Counsel for the defendant objects to the question asked the witness on the ground that the question does not call for the best evidence,—the resolutions and ordinances themselves being the best evidence.

A. There was no other action taken affecting the paving of the streets, I should say the asphalt paving.

Q. Do you mean the pavement in question?

A. Yes sir.

Q. On each of the three streets I have mentioned?

A. Yes sir, that is the asphalt pavement on each of the three streets.

Q. Then if I understand you, these resolutions and ordinances to which I have called your attention on each of these three streets, were the only action taken by the board of aldermen concerning the pavement in question.

Counsel for the defendant objects to the question asked the witness on the ground that it does not call for the best evidence, the records themselves being the best evidence, and also because the question is indefinite and calls for a conclusion of the witness.

Q. I will ask you Doctor, if you are not familiar with it, to look at the map and state when lots 1, 2, 7 and 8 block 39, and the south 15 feet of lots 1 and 2 block 50; lots 1 and 2 block 49 lots 3 and 4 block 41, all in Hyde Park were brought into the city limits of the city of Westport?

540 Counsel for the defendant objects to the question asked the witness for the reason that the record of the proceedings extending the limits of the city of Westport are the best evidence, and because the question calls for secondary evidence, and for an opinion of the witness.

A. They were brought into the limits of the city of Westport in 1891. I don't remember just the date, but that was the year.

Q. These lots were or are situated on 38th street and near 38th street are they not?

A. Yes sir.

Q. Within the limits of what town or city were they prior to the year 1891?

A. They were in the county. They were not within any city limits.

Q. They were a part of Jackson county, but were not within any city limits?

A. Yes sir.

Q. Now how far on the pavement in question is that answer true north of 38th street?

A. I don't understand the question.

Q. (Question repeated.) I mean as to not being within any city limits prior to 1891?

A. All of the territory between 31st street, and about the center of the block between 38th and 39th from Main street west was outside of any city limits at that time.

Q. Now about how many blocks were on each of these pavements on Main street, Baltimore avenue and Wyandotte street north and south?

A. Well let me see? On Main street the pavement runs from 31st to Westport avenue.

Q. Nine blocks is it not?

A. It is about nine blocks. I think it is about nine blocks, but there are some irregular streets in there, and there is more blocks

on the east side than there is on the west side of the street. On Baltimore avenue it is from 33rd street or Hunter avenue to Westport avenue.

541 Q. There is two blocks less then in that pavement than there is on Main street?

A. Yes, sir, at least that.

Q. And the same on Wyandotte street?

A. Yes sir the same on Wyandotte street.

Q. Now if I understand your answer correctly the pavements on these streets that were in Jackson county in 1891 and not in the limits of any city,—all of them were so situated, excepting a block and a half on the south side, that is from Westport Ave. to the middle of the block between, 38th and 39th street about?

A. Well that was all that was in the city of Westport.

Q. Yes sir?

A. Yes sir.

Q. That is a block and a half on the south side of these three streets was all that was then in the city of Westport?

A. Yes sir.

Q. And the blocks and lands north of about the center of 38th and 39th streets were not in any city?

A. No sir, not up to 31st street.

Q. Well that is the greater portion of the length of these three streets?

A. Yes sir.

Q. By several blocks?

A. Yes sir.

Counsel for the defendant moves the court to strike out all the evidence of this witness in respect to the city limits, for the reason that the city limits are fixed by the proceedings of the mayor and common council and the testimony elicited is secondary evidence.

Q. Do you remember when and how Main street and Wyandotte street were acquired by the public and if so state it?

Counsel for the defendant objects to the question asked the witness on the ground that it calls for secondary evidence.

A. Why the plats of the additions showed the dedication. That is my understanding of it. I don't know anything more about it than the plats show.

542 Q. Well I will ask you if these streets were ever condemned by the city of Westport,—I mean Main street, Baltimore avenue and Wyandotte street?

A. Well there was a condemnation proceeding on Baltimore avenue, but I don't think it was ever carried through.

Q. What part of Baltimore avenue was that?

A. From Westport avenue to the north city limits of Westport.

Q. The old city limits?

A. Yes sir.

Q. You mean the north city limits prior to 1891?

A. Yes sir.

Q. North of the old city limits of Westport to the north line of the pavements in question, there never were any condemnations of ground?

A. No sir. Not to my knowledge.

Q. Was Main street, Baltimore avenue or Wyandotte street, before the work in question in 1897 thereon, brought to the established grade at the cost of the city of Westport, or paid for out of the general revenue fund of the city?

A. No sir.

Q. That is all.

Cross-examination by Mr. SCARRITT:

Q. Mr. Love you have answered a general question put to you by Judge Field, in respect to the final *rp*oceedings relative to the three paving contracts in question? Now is it not a fact that a petition of a majority of the resident property owners of the city of Westport, petitioned to have the work that was finally done on each of these three streets executed, and was not that petition filed with the mayor and council before the resolution you have mentioned was adopted?

A. Yes sir.

Q. And the records show that fact, do they not?

A. Yes, sir.

Q. Then the resolutions that you referred to in your answer were adopted?

A. Yes sir after the petitions were filed.

543 Q. And each of these resolutions were duly published?

A. Yes sir.

Q. And then the improvement ordinances on each street were enacted to which you have referred?

A. Yes sir.

Q. Is it not a fact that thereupon the engineer made an estimate of the cost of the work, and presented that to, and filed it with the mayor and common council?

Counsel for the complainant objects to the question asked the witness on the ground that it is matter that has heretofore been fully gone into in the prior cross-examination of this witness, and it appeared that that estimate was in writing, and it is not shown to be lost or destroyed, and the estimate itself is the best evidence and objection is made to the question on the ground that it calls for secondary evidence.

By Mr. SCARRITT: I ask these questions for the reason that Judge Field asked the witness to state what official proceedings were had in reference to the contracts, and I deem it proper to call the attention of the witness to matters which I think he inadvertently omitted in his answer to the former questions.

By Mr. FIELD: "I don't object to the evidence showing that an estimate was filed if you simply propose to show that fact, and do not propose to show the contents of it."

By Mr. SCARRITT:

Q. Answer the question?

A. Yes sir the estimates were filed.

Q. A separate estimate was filed for the work on each of these streets, is that what you say?

A. Yes sir.

Q. And that estimate was separate from the contract and specifications afterward entered into?

A. Yes, sir.

Q. For the several contracts?

A. Yes sir. They were separate papers of course.

Q. After the estimate was filed by the engineer as you have stated, contracts or bids were advertised for and the work was let,

544 and then afterwards formal contracts were entered into for the performance of this work was there not?

A. Yes sir.

By Mr. FIELD: "I object to that because the time of the estimate must appear from the records made by the clerk and the time it was filed must appear and does appear and the paper is still in existence, and that being the case it is the best evidence" as to when it was filed and as to the contents of it."

By Mr. SCARRITT:

Q. Answer the question?

A. Well now I would not like to testify positively without an examination of the papers as to the exact dates or times of these actions or proceedings.

Q. Well state whether or not each of these proceedings were had and had in the order named?

Counsel for the complainant objects to the question asked the witness on the ground that it calls for secondary evidence and for a conclusion of the witness.

A. Yes sir. That is my recollection.

Q. And after the work was done, the assessment ordinance to which you have referred in answer to Judge Field's question was then enacted?

A. Yes sir, the levy ordinance.

Q. That is all.

Re-direct examination by Mr. FIELD:

"I move to strike out the answer of the witness that his recollection of the time when the estimate was filed as testified to by the witness, on the ground that it is not the best evidence and in support of this objection I will ask the witness a question.

Q. Is that estimate you have referred to still in existence?

A. It was a short time ago. I think I have seen it within a month.

Q. On each of these streets?

A. Yes sir.

545 Q. Where did you see it?

A. It was in the possession of the city clerk the last time I saw it.

Q. The city clerk of Kansas City, Mo.?

A. Yes sir.

Q. That is the estimate on each of these streets that you have referred to in your testimony?

A. Yes sir.

Q. As I understand you, you can't be positive as to when or as to the time that estimate was filed?

A. No sir I would not like to say positively for I don't remember the dates.

Q. That is all.

Re-cross examination by Mr. SCARRITT:

Q. But you know positively that in each case the estimate was filed before the contract was entered into?

A. Yes sir, I am reasonably certain upon that point.

Counsel for the complainant objects to the question asked the witness and the answer thereto on the ground that is is not the best evidence.

By Mr. FIELD:

Q. I will ask you this question in further support of that objection if the date of the filing of each one of these estimates is not endorsed or written on the back of it, and signed by you as the city clerk of the city of Westport?

A. Yes sir.

Q. That on the back shows the date?

A. Yes sir.

Q. So that not only the contents of the instrument itself but also the date of the filing thereof are in writing?

A. Yes sir.

By Mr. SCARRITT:

Q. Do you wish to modify that answer to Judge Field's original question in which as I understood you you have the official proceedings that refer to three public contracts as being the resolution, the improvement ordinance and the assessment ordinance?

A. Yes sir, and the ordinance to confirm. The ordinance to confirm the contract following the ordinance to do the work. To

546 be more explicit, I will state that the proceedings were these— first there was the adoption of a resolution declaring the work to be necessary. There was no petition required under our charter but there was a petition filed, but we did not consider that a necessary proceeding at all.

Q. Well mention what was necessary to be done?

By Mr. FIELD: Yes sir and mention that petition too, for I guess that is right, that was received.

A. Yes sir, there was one petition in each instance for the work. Then followed the resolution, then the ordinance to do the work, and then the ordinance confirming the contract.

Q. You have stated them all?

A. I think so.

By Mr. SCARRITT:

Q. You have left out this estimate?

A. Well there was some work done in the city engineer's department besides, such as advertising for bids and awarding the contract.

Q. Well there was an estimate prepared and filed there also, was there not, estimating the cost of the work and apportioning it?

A. Yes sir.

Q. Now Doctor, you have got that mixed up and you throw down our proceeding and you know better?

A. No sir, I think not.

Q. You have mentioned your confirmation ordinance and you have mentioned no estimate?

A. Well I know that. I thought I explained that. There was an estimate before the confirmation ordinance. I am talking about the *rp*oceedings of the council, that is all I am talking about. I am not talking about everything that was done by every different person about it.

Q. Yes sir that is true, but it was just as much the business of the council to receive and file an estimate for the work as it was to adopt an ordinance?

547 A. Yes sir I suppose it is.

Q. And it goes on record just the same as an ordinance?

A. Yes sir it goes on record. There is no doubt about that. Well I don't think there is any occasion for further explaining that, for the whole thing is generally in evidence,—the whole proceeding it seems to me has been gone over and put in evidence two or three times, but if it is necessary I will commence again and give the whole thing, including all that was done or that appeared to be done by every one connected with it if you want it that way.

Q. Yes sir, that is what I want?

A. By the board of aldermen and by the engineer?

Q. Certainly that is all proper?

A. Well the action of the board of aldermen. What action was taken by the board of aldermen. What is the question I understood Judge Field to ask me.

By Mr. FIELD:

Q. Now Doctor this petition that you have referred to, and these so called estimates that you have referred to, you have been examined about these same matters in your previous examination have you not?

A. Yes sir, and I think it was by you.

Q. Was there more than one petition received or filed there by you as city clerk for each of these pavements?

A. No sir.

Q. I think that is all. Now can you think of any other or further action taken by the board of aldermen, excepting what you have stated in response to questions propounded by me and questions propounded by Mr. Scarritt?

A. No sir I think you have got all of it.

Q. That is all. No there is one ordinance I desire to introduce in evidence. Can I refer to it by giving the page of the record without giving the date.

By Mr. SCARRITT: "Certainly."

548 By Mr. FIELD: It is the ordinance regulating the method of making and issuing tax bills and I think that is substantially the title of it. It is in volume 5, pages 34 and 35 of the ordinances of Westport. That is all.

G. L. LOVE.

Sworn to before me on the day within the hours and at the place in that behalf first aforesaid, and subscribed in my presence this 15th day of June, 1900.

[SEAL.]

JOHN M. ORR,
Notary Public, Jackson County, Missouri.

UNITED STATES OF AMERICA, }
State of Missouri, County of Jackson, } ss:

I John M. Orr, a notary public within and for the county of Jackson in the State of Missouri, do hereby certify that pursuant to an agreement and stipulation entered into by and between the parties hereto whereby it was agreed and stipulated that the depositions taken at this time should be so taken without formal notice of same, said notice being waived, there appeared before me on the 8th day of June 1900, at the law office of R. H. Field in the New York Life building, Kansas City, county and State aforesaid George L. Love, who was by me first duly sworn to testify to the truth the whole truth and nothing but the truth of his knowledge of and touching the matter in controversy aforesaid that his said deposition was reduced to shorthand writing by me, pursuant to a stipulation and agreement in that behalf entered into in my presence, that

549 I transcribed my said shorthand notes of the deposition of said witness and that said witness subscribed same at the time set forth in the certificate to the signature of said witness, and his said deposition is not herewith returned.

In witness whereof I have hereunto set my hand and notarial seal this 15th day of June 1900.

My commission will expire January 14th, 1901.

[SEAL.]

JOHN M. ORR,
Notary Public, Jackson County, Missouri.

Notary's fees $7.05 due J. M. Orr.
Witness fees $1.00 paid by complainant.
[SEAL.]

550 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant.

Depositions.

UNITED STATES OF AMERICA,
State of Missouri, County of Jackson, } ss:

Depositions of witnesses produced, sworn, and examined on the 12th and 16th days of July, 1900, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of said days, at the law offices of Messrs. Scarritt, Griffith & Jones in the American Bank building, Kansas City, Jackson county, Missouri, before me, Alfred Fidler, a notary public within and for Jackson county, Missouri, in a certain cause now pending in the circuit court of the United States for the western division of the western district of Missouri, between Richard H. Field, complainant, and The Barber Asphalt Paving Company, defendant, on the part of the defendant.

Appearances.

Mr. Richard H. Field, the complainant, appeared personally.
Messrs. Scarritt, Griffith & Jones appeared for the defendant.

At this point it was agreed by and between the parties complainant and defendant to this action that these depositions taken by Alfred Fidler be taken in shorthand and be by him transcribed on the typewriter and when thus transcribed and subscribed by the respective witnesses that said depositions should be of the same force and effect as if they had been taken in longhand and subscribed by the respective witnesses immediately after the taking of the same.

And the said witnesses, each one of them being of lawful age, and having been by me first cautioned and sworn to tell the truth the whole truth and nothing but the truth, in the matter in controversy aforesaid, I did with the assistance of counsel, carefully examine the said witnesses, and they did thereupon depose and say, respectively, as follows:

551 PATRICK MOORE, of lawful age, being produced, sworn and examined on the part of the defendant deposeth and saith as follows:

Direct examination by Mr. SCARRITT:

Q. State your name, residence and business.

A. Patrick Moore, 4114 Walnut, Kansas City, Missouri. Contractor.

Q. You reside in what was formerly Westport, Missouri, do you?

A. Yes sir.

Q. Are you familiar with that portion of Main street, Baltimore avenue and Wyandotte street paved by the Barber Asphalt Paving Company under the contract referred to in the bill of complaint in this cause?

A. I know the three streets spoken of from 33d south to Westport avenue.

Q. You refer to that portion of the street paved by the Barber Company with asphalt pavement?

A. Yes sir.

Q. What, if anything, did you have to do with the execution of the contracts between the City of Westport and the Barber Asphalt Paving Company for the paving of those three streets?

A. I prepared the road bed for the laying of the concrete in all three streets.

Q. You may state whether at the time the contracts were entered into Wyandotte street along the entire distance improved was graded substantially to the established grade of that street?

Counsel for complainant objects to the question as calling for the conclusion of the witness and not the best testimony as to what was the grade of the street.

A. It was, and macadamized before.

Q. Under what authority had it been graded, if you know?

Counsel for complainant objects to the question as not calling for the best evidence.

552 A. Well it was graded and macadamized under the laws of Westport, the city of Westport then.

Complainant moves to strike out the answer because it is a mere opinion of the witness and not the best evidence.

Q. By public contract?

A. Yes.

Q. Was the grading done under a contract separate from the macadam work?

Complainant objects to the question as calling for a mere opinion of the witness.

A. No.

(Question read.)

A. I do not know.

Q. This grading and macadamizing to which you refer, you may state whether or not that was done several years before the asphalt pavement was laid?

Complainant objects to the question as calling for the mere opinion of the witness.

A. It was done four or five years before.

Q. When the contract between the City of Westport and the Barber Company was entered into you may state whether or not Wyandotte street was curbed at that time?

A. Yes sir.

Q. Was the curbing changed before the asphalt paving was laid?

A. Not as I know of.

Q. Well you would know if it had been, would you not?

A. I would.

Q. State whether or not the street was paved by the Barber Company to conform to the curbing already set along the street.

A. It was.

Q. I believe you said that Wyandotte street was substantially upon the established grade at the time the paving contract was entered into?

Complainant objects to the question as not calling for the best evidence and calling for a mere conclusion.

553 A. Yes sir.

Complainant asks the court to strike out the answer of the witness as a mere conclusion.

Q. The only grading then that you did upon the street was to excavate, was to make the necessary excavation for the foundation of the pavement?

Complainant objects to the question as calling for the mere conclusion of the witness and as being leading.

A. Yes sir.

Q. Do you know whether the street had been graded prior to the time the asphalt pavement was laid, by public contract and tax bills issued in payment of it?

A. No sir, I do not.

Q. Do you know whether or not it had been macadamized upon the established grade by public contract?

Complainant objects to the question as calling for the conclusion of the witness as to what was the established grade of the street and there is no particular street named in the question and I do not know what street he is talking about.

A. Yes sir.

Q. We are talking about Wyandotte street along the distance paved by the Barber Company. Now did you see the street after it was paved by the Barber Company?

A. Yes sir.

Q. Was any change made in the grade of the street in the laying of the pavement?

Complainant makes same objection as made above.

A. No sir.

Q. What connection, if any, did you have with the execution the contract between Westport and the Barber Asphalt Compa for paving Main street under the contract referred to in the bill complaint in this case?

A. I done some on Main street, as well as on the other, that is graded for the base.

554 Q. You may state whether or not at the time the contra referred to was entered into Main street along the entire di tance improved was substantially on the established grade?

Complainant objects to the question as calling for the conclusio of the witness as to what was the established grade of the street.

A. It was graded all the way and curbed and macadamized.

Q. State whether or not there was a double track street car rai road on the street?

A. Yes sir, there was all the distance.

Q. Was that on the established grade?

Complainant objects to the question as calling for the conclusio of the witness as to what was the established grade of the street.

A. Yes sir.

Q. You may state whether or not you saw the street after the as phalt pavement was laid upon it?

A. Yes sir.

Q. Was any change made in the grade of the street by that pave ment?

Complainant objects to the question as calling for the conclusion of the witness.

A. None at all.

Q. You may state whether or not the asphalt pavement was laid to conform to the grade of the curb and street car tracks that were on the street at the time the contract for the paving with asphalt referred to in the bill of complaint was entered into?

A. It was graded to the proper grade to conform to the track and the curb.

Q. What connection, if any, did you have with the execution of the paving contract between the City of Westport and the Barber Asphalt Paving Company for paving Baltimore avenue referred to in the bill of complaint?

A. I done the grading on Baltimore avenue from 33d to

555 Westport avenue.

Q. What grading do you refer to?

A. Dirt grading for the asphalt paving, their sub-grade.

Q. You may state whether or not the surface of that street was substantially upon the established grade at the time the paving contract was entered into?

Complainant objects to the question as calling for the conclusion of the witness as to what the established grade was. He can show that he knows what is the established grade of the street and then state how much was excavated below the surface of the street or how much was filled by his grading.

A. It was.

Q. Had any part of it been graded by public contract and tax bills issued therefor?

By Mr. FIELD: I do not see what he knows about that.

By Mr. SCARRITT:

Q. Before the paving contract was let?

A. No sir.

Q. Had it been graded by any person substantially to the established grade before the paving contract was let?

Complainant objects to the question as calling for the conclusion of the witness.

A. I do not know that I can answer that intelligently except this that the curbing was just after being put in fresh and it would not average more than a foot of grading, about what it was on any other streets.

Q. Do you mean by that that the dirt street is raised in the center and when you take out the dirt necessary to get in the concrete for the paving it usually means that you excavate about a foot of earth?

556 Complainant objects to question as leading and irrelevant.

A. Yes sir, from nine inches to a foot.

Q. And you say that is the amount of grading you did on this street?

A. That is about the amount of grading that I done on that street.

Q. Was the street paved by the Barber Company to conform to the curbs which you say were set at the time the contract was let?

A. Yes sir.

Q. You may state whether in paving the street with asphalt the grade of the street was changed in any respect?

Complainant objects to the question as calling for the conclusion of the witness and not the best evidence.

A. No sir.

Q. You are quite familiar with all of these streets as to which you have testified, are you not?

A. I ride over them nearly five or six days in a week, some of them.

Q. And were familiar with them before this paving work was done?

A. Yes sir.

Q. You may state whether any extra charge was made by your company in its bid for the work on account of doing any grading?

A. I can't tell,—I do not know the prices they got, but they did not pay me anything extra.

Complainant objects to the question as immaterial what Mr. Moore's company did unless it was the defendant company,—how much more was charged on account of the grading.

(Question withdrawn.)

Q. State whether or not it is customary and always has been in the city of Westport to include in the paving contract the work of excavating the street surface from the established grade to a depth necessary to put in the foundation called for in the paving contract as a part of the work of paving.

557 Complainant objects to the question as immaterial, and further because there is no competent proof here that these streets were at the established grade at the time the work in question was ordered done.

A. I do not understand the question.

(Question read.)

A. It has been customary.

Q. Always?

A. Always.

(Same objection in full.)

Cross-examination by COMPLAINANT:

Q. What is the custom now you have testified to, Mr. Moore?

A. The custom?

Q. Yes.

A. The custom is that a street as a general thing is always ready for paving when the grading has been done. Now the custom is for to take out as sub-grade sometimes a foot and sometimes less.

Q. Do you remember the amount of grading that you did on Baltimore avenue?

A. Yes. I say that it averaged about a foot all over the street,—I do not think it would go any more.

Q. Do you mean from Westport avenue to 33d street?

A. Yes sir, it averaged that much.

Q. Do you mean that you excavated that much or filled in that much?

A. Some places six inches and some places over that, but my recollection is it would average about a foot.

Q. Do you have a pretty good recollection about that or is it a mere impression?

A. It is my recollection.

Q. Was it an excavation or fill?

A. There was one place I think close to 36th street there was a fill there.

Q. How long was it?

A. I do not think it was more than fifty or seventy-five feet,—it was a low place.

Q. You had to fill there?

A. Yes sir.

Q. You think besides that there was an average of about a foot?

A. The whole thing, the whole street.

558 Q. What was the greatest depth?

A. Perhaps fifteen inches. I do not remember any place that would go over that.

Q. Do you remember one place about 300 feet south of 33d street, which is Grand boulevard, that it went two feet?—you understand 33d street is called Grand boulevard.

A. That is Hunter avenue.

Q. Do you remember it went over two feet?

A. No sir.

Q. Do you remember some places the top of the curb was below the surface of the street, in some places?

A. I do not think it was.

Q. Well do you say it was not in some places?—I want you to be positive about it.

A. I do not recollect that it was.

Q. Well you could not be positive then but at some places it was below the surface of the street before you began grading?

A. I cannot answer that.

Q. Your best answer is that your excavation you made there would average about twelve inches?

A. About twelve inches.

Q. Now the surface of the pavement was even with the top of the curb was it?

A. About that. I think it would average that all over the street very near.

Q. I am talking about after the Barber Company completed the pavement, that was even with the top of the curb in the center?

A. Oh yes.

Q. And on the sides of the street it ran down to the curb from the center kind of rounding?

A. Yes sir.

Q. And next to the curb the paving was five or six inches from the top of the curb?

A. Yes, the curb is about five or six inches, and it would make it about fourteen inches from the top of the curb to the bottom of the concrete, seven inches of material I think went in there.

Q. Do you mean your excavation was all the way across the street about that, or just in the center?

A. My recollection of the street is this,—I don't want to be

559 cornered,—A. The best recollection I have of it is it would average twelve inches all over the street, all over the whole

surface from curb to curb.

Q. From curb to curb and from north to south?

A. Yes sir.

Q. The curb is on the east and west sides of the pavement?

A. Yes sir.

Q. And you think the excavation was from curb to curb?

A. About 12 inches.

Q. And that was the condition, your recollection is, you found Baltimore avenue in?

A. Yes sir.

Q. It averaged abont 12 inches, what you took out?

A. It averaged about 12 inches, what I took out.

Q. How long had this street been curbed when you made this excavation, do you remember?

A. We were waiting for the curb to dry according as we were following them up.

Q. You began this work then before the curbing was completed?

A. They were a few blocks ahead of us.

Q. As they would complete it you would come on with your grading?

A. Yes sir.

Q. Do you remember how much excavating or filling you did on Main street?

A. There was very little to be taken out and some places it had to be filled in with broken stone to bring it up to the required height.

Q. Do you remember how much you did on Main street of filling it in places?

A. No sir, I do not.

Q. Where was the filling that you made?

A. In each and every block it was worn out so that there had to be something put in.

Q. There was nothing worn between 39th street and Westport avenue?

A. Oh yes it was.

Q. Take that block?——

A. It is too much to recollect each block as we came to it.
560 Sometimes we had to take out some and sometimes fill in some. Now the filling in on Main street means filling in with broken stone.

Q. Did you excavate on Main street?

A. Yes sir.

Q. Do you remember the parts of Main street that you excavated?

A. No sir, I can't recollect the spots, but we had a little work to do all over Main street.

Q. Some excavating and some filling to do on Main street, but you do not remember how much?

A. Yes sir.

Q. What work did you do on Wyandotte street?

A. Well just the same as on Main street, taking the high parts

down and filling in others with broken stone to bring it to the required height.

Q. Don't you remember Wyandotte street was not so worn as Main street?

A. I do not think it was.

Q. Don't you remember that on Main street there the very bottom of the curb was exposed to view because of the washing, between 37th and 38th?

A. The washes, yes sir.

Q. You do not remember what was the condition of Main street between 39th and Westport avenue?

A. We done something in every block, there is no block no matter how close it is you have to do something.

Q. Don't you remember you had simply to sweep off the surface at the car barn?

A. No sir.

Q. You know that had been macadamized by the city of Westport.

A. Yes sir.

Q. Main street north of 39th was macadamized by the county before it was taken into the city limits?

A. Yes sir.

Q. Westport had nothing to do with that?

A. No sir.

Q. Do you know as a matter of fact what is the established grade on these streets, from memory?

A. No sir, that is something I cannot tell. We would have to have an engineer to tell that. The top of the curb generally was the established grade.

(Signature waived)

561 Sworn to before me on the day within the hours at the place in that behalf aforesaid, and subscribed in my presence this — day of ——, A. D. 1900.

——— ———,

Notary Public, Jackson County, Missouri.

Not being able to complete the taking of these depositions on this day by reason of the absence of other witnesses whose depositions the defendant was desirous of taking, by and with the consent of the parties complainant and defendant to this action I adjourned the further taking thereof until July 16th, 1900, then to be resumed at the same place and within the same hours mentioned in the caption hereof.

Given under my hand and notarial seal this 12th day of July, 1900.

——— ———,

Notary Public, Jackson County, Missouri.

Pursuant to adjournment as above stated, on this the 16th day of

July, 1900, between the same hours mentioned in the caption hereof, at the same place, all parties complainant and defendant being in attendance either in person or by attorney, I resumed the taking of said depositions as follows:

GEORGE L. LOVE, of lawful age, being by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, deposeth and saith,—

Direct examination by Mr. W. C. SCARRITT:

Q. Your name is G. L. Love?
A. Yes. sir.
Q. Where do you reside, or rather where did you reside in the year 1897?
A. Westport, Missouri.
Q. Are you and were you familiar at that time with that portion of Main street, Baltimore avenue and Wyandotte street paved by the Barber Asphalt Paving Company in that year, under the contract referred to in the bill of complaint in this suit?
A. Yes sir.
Q. At the time the grading was done,—or at the time the paving was done
A. Yes sir.
Q. State the condition of Wyandotte street along the distance so improved at the time the paving contract was entered into, in respect to its surface conforming to the established grade of the street?
A. Well the street was macadamized, and I think it was practically at grade; but it may have been at some places worn a little.
Q. Had the street along that entire distance been graded
562 to the established grade by a public contract of the city of Westport, prior to the time of the paving with asphalt?
A. Yes sir.
Q. As I understand you then, after it was so graded it was paved with macadam?
A. Yes sir.
Q. Was this macadam paving laid to the established grade?
A. How is that?
Q. Was this macadam pavement laid to the established grade?
A. It was so reported by the engineer.
Q. State whether or not the curbing was in place at the time the paving contract,—the asphalt paving contract,—was entered into?
A. It was.
Q. On what grade was the curbing set?
A. The ordinance called for the true grade of the street.
Q. The established grade?
A. Yes sir.

By Mr. FIELD:

Q. You mean the top of the curb?
A. Yes sir the top of the curb conformed to the established grade.

By Mr. SCARRITT:

Q. And was the asphalt pavement laid to conform to grade of the curb?

By Mr. FIELD: "I object to that as being immaterial here."

A. It was reported so by the engineer at the time of the completion of the work, and the acceptance of it.

By Mr. SCARRITT:

Q. What is that? I did not quite catch that?

A. I say it was so reported by the engineer at the time of the completion of the work and its acceptance.

Q. Well now Doctor, you have been over these streets,—over that street frequently since it has been paved with asphalt, have you not?

A. Yes sir.

563 Q. State whether it was paved to conform to the grade of the curb, or the established grade?

A. I think it was.

Q. It was?

A. Yes sir I think so. That is my judgment.

Q. State whether or not it was accepted by the city officials of Westport as being so laid?

A. Yes sir it was.

Q. You may state whether or not that part of Baltimore avenue which was paved by the Barber Asphalt Paving Company, referred to in the bill of complaint, was at the time the paving contract was executed, substantially upon the established grade?

By Mr. FIELD: "Well I object to that on the ground that it calls for a conclusion of the witness and not the best evidence as to what was the established grade. What was the established grade is a matter that is fixed by ordinance."

By Mr. SCARRITT:

Q. Answer the question?

By Mr. FIELD: "I object to it for the further reason that it calls for a conclusion of the witness. He can state what was the established grade."

By Mr. SCARRITT: "I prefer for the witness to answer my questions and not yours. When the time comes you can examine him, but now you can object to the questions I ask."

Q. Answer the question?

A. I think the street was practically at grade.

Q. State what, if any portion of that part of the street referred to had been graded by public contract? That is had been graded by public contract to the established grade thereof?

A. From 36th street to Westport avenue, had been graded by public contract.

Q. Had the street prior to the asphalt pavement—had it prior to

that time had any other improvement put upon it at the established grade?

A. I don't quite understand what you mean?

564 Q. Well I mean that part of the street to which you have referred?

A. Well I don't know that I understand just what you are driving at, but sidewalks had been constructed along it, and just prior to the pavement in question being laid a granitoid curb and gutter had been placed upon it.

Q. Well had not that part of the street also been macadamized?

A. Baltimore avenue?

Q. Yes sir?

A. No sir there never was any paving on that street until the asphalt paving.

Q. Well the entire length of Baltimore avenue,—I mean that part of Baltimore avenue upon which the asphalt pavement was laid,—was curbed and guttered was it not prior to the laying of the asphalt pavement on it?

A. Yes sir, it was.

Q. And that work was done by a seperate and different contract was it not from the one that did the asphalt paving?

By Mr. FIELD: "What work was that?"

By Mr. SCARRITT: "The curbing and guttering."

By Mr. FIELD: "This is Baltimore avenue you are talking about now?"

By Mr. SCARRITT: "Yes sir."

Q. Now you have stated that Baltimore avenue south of 36th street prior to the laying of the asphalt pavement or the letting of the contract therefor, to the established grade?

A. Yes sir.

Q. State whether or not the street north of 36th street had been graded by any one, and if so who?

A. We found the street graded when the city of Westport extended its limits taking in that territory. It had been done I suppose by the owners of the property when they platted the ground,—at any rate, that is the way I understand it.

Q. State the history of that part of Baltimore avenue north of 36th street, with reference to the established grade, so far as you know it?

A. My understanding was that at the time Kansas City extended its limits in 1889,—the extension that was afterwards declared illegal,——

565 By Mr. FIELD: "Well I object to that. I object to any hearsay testimony."

A. The city established the grade on that street——

By Mr. FIELD: "I object to that as not the best evidence."

A. And the property owners did the grading themselves. At least Westport, when it extended its limits found it graded.

By Mr. SCARRITT:

Q. When Westport extended its limits so as to include that portion of the street, what grade if any, did it establish, with reference to the surface of the ground as it then existed?

By Mr. FIELD: "I object to that as not the best evidence,—the ordinance itself is the best evidence."

A. My understanding from the engineer is or was, that he took the surface of the street, or the old grade that had been established by Kansas City.

By Mr. FIELD: "I make the further objection to the answer that it is hearsay testimony."

By Mr. SCARRITT:

Q. Now did you see the surface of that part of Baltimore avenue after the curb and gutter were laid upon the street, and just prior to the making of the asphalt paving contract?

A. Well now I can't say. I don't remember whether I was over that part of the street or not at that time. I really could not say whether I did or not.

Q. Well you were familiar with the surface of the street at that time I understand you to say in your previous answers?

A. Oh yes I knew in a general way, just from noticing it in passing along.

Q. You may state whether the surface of the street as it existed at the time the asphalt paving contract was entered into, was substantially on the same grade on which the asphalt pavement was laid?

By Mr. FIELD: "I object to that as argumentative, and as calling for a conclusion of the witness, on a matter capable of specific proof."

566 A. I think it was practically the same grade.

By Mr. SCARRITT:

Q. State whether or not any charge was made in the assessments levied to pay for the paving of the street, by reason of any extra grading upon the street?

By Mr. FIELD: "I make the same objection to that question as to the previous question,—as to whether any extra charge was made is a matter of writing and would appear in the records, ordinances and contracts, and it is a matter about which the witness cannot possibly know."

By Mr. SCARRITT:

Q. You may answer the question?

A. I could not say as to that, for I know nothing about measuring or computations of work,—that was all done by the city engineer, and I personally know nothing about it.

Q. You may state whether that part of Main street paved by the defendant company described in the bill of complaint, was substantially upon the established grade of the street at the time of the paving was entered into?

By Mr. FIELD: I make the same objection to that question as I did to the similar question that was asked regarding Baltimore avenue."

A. I think it was practically at grade.

By Mr. SCARRITT:

Q. You *think* it was?

A. Yes sir.

Q. Was the surface of the street before the asphalt pavement was laid substantially on the same grade that it was after the asphalt pavement was laid?

By Mr. FIELD: "I make the same objection to that question."

A. Well a good portion of the street was. Now between 36th and 38th streets,—especially between 37th and 38th streets,—there had been considerable wash on the sides of the streets, and they were considerably washed out and gullied in places.

567 By Mr. SCARRITT:

Q. You mean the macadam had been washed by the rains, and worn away?

A. Yes sir the macadam had been washed out and it had guttered, and some of the curb had fallen in, but there was not any serious departure from the grade. It was just a sort of gully.

By Mr. FIELD: "I move to strike out the latter part of the answer to the effect that there "was not any serious departure from the grade," as a conclusion of the witness.

By Mr. SCARRITT:

Q. How had the street been improved, if at all, prior to the laying of the asphalt pavement? In other words, what was on the surface of the street?

A. Macadam.

Q. Well were there any street railway tracks there?

A. Yes sir the Grand Avenue Railway Company, or the Metropolitan Street Railway Company now, had a double street car track there on the street.

Q. State whether you know,—whether or not you know, that these tracks were on the established grade of the street?

A. That was my understanding that the slot rail was the grade of the street.

Q. You may state whether or not these street railway tracks were

extended before the city limits extended over that portion,—I mean the Westport city limits,—extended over that portion of the street?

A. Yes sir they were.

Q. And as you say the elevation of the slot rail, was accepted as the established grade of the street?

A. Yes sir, and it was taken by the city in establishing the grade. They took the slot rail for the grade. That is my understanding of it.

Q. And established that elevation as the grade by the ordinance establishing the grade?

A. Yes sir.

Q. Now after the railroad tracks were constructed, you say the street was macad-mized over the whole length?

A. Yes sir.

Q. Prior to the macadamizing, state whether or not that portion of the street was curbed entirely?

A. No sir, it was not.

568 Q. The macadam was constructed without the curb?

A. Yes sir. Without the curb.

Q. Now you may state, if you know, whether or not the curbing was constructed along that street on the established grade, prior to the execution of the contract for the asphalt paving?

A. Yes sir it was.

Q. Was this curbing put in place by a different contractor from the paving contractor?

A. Yes sir it was.

Q. Now Doctor, state whether or not the curbing as constructed, conformed to the established grade, and to the grade of the railroad tracks on the street?

By Mr. FIELD: "You mean the top of the curb?"

A. Well yes, I think it conformed to the established grade. Well now let me make this explanation. When the established grade on the street was made, there was quite a little dip just south of 36th street, and the city raised the grade there above the slot rail from six inches to a foot, and may be more than that at different places, and they were going into court to compel the Cable Railway Company to raise its tracks to that grade, but it was held in consultation for a long time, and previous to the paving that portion of the grade was re-established, taking the top of the slot rail as the grade all the way through, and the curb that had been set to the grade of the street as established previous to that along that distance, was lowered to conform to the grade of the street as finally established. That was my understanding of the thing.

Q. Now state whether or not that was done,—after that was done,—the defendant company paved the street at that time, to conform to the grade established, and the elevation of the tracks and the curb as they existed at the time the paving was done?

By Mr. FIELD,—"You mean in 1897."

A. Yes sir, that was my understanding.

569 By Mr. SCARRITT:

Q. You have passed over that street frequently, have you not?
A. Yes sir.
Q. Is that not a condition that exists now, and has existed since the asphalt pavement was laid?
A. Yes sir.
Q. Now you may state Doctor from your own personal knowledge so far as it enables you to state it, whether or not in the grading, it was done by the asphalt paving contractor on any of these streets in the course of the execution of his contract,—that is I mean to ask you whether or not any more grading was done by the asphalt paving contractor, any more than is usually done, or is usually and ordinarily contemplated in doing what is known as "sub grading" for a pavement?

Counsel for the complainant objects to the question asked the witness on the ground that it calls for a conclusion of the witness, and is immaterial.

A. I don't think there was any more than that,—just surfacing the sub-grade.
Q. That is all.

Cross-examination by Mr. FIELD:

Q. Now this last street you have been interrogated concerning by Mr. Scarritt, is Main street?
A. Yes sir.
Q. I will ask you if prior to the pavement by the defendant company in 1897, the road-way,—any work had been done on it in these public contracts you have testified to?
A. How is that Judge?
Q. You have spoken about certain public contracts here for work done on these streets, and I will ask you if Main street was brought to any established grade by a public contract, previous to the work done by the defendant company in the way of paving the street with asphalt in 1897?
A. No, sir. Not the road-way.
570 Q. Well the pavement covers all of the road way does it not?
A. Yes sir, all of the road way was covered.
Q. The work that had been done on the road way previously, was done by the county court of Jackson county, Missouri, was it not?
A. Yes sir and the property owners along the street, for I understand that it was a joint pavement.

By Mr. SCARRITT: "Well that was a public contract."

By Mr. FIELD:

Q. Well I am asking him about the contracts he referred to in your direct examination. That was not a contract of the city of Westport?

A. No sir it was not a city contract.

Q. There was no contract let for the work by the city of Westport?

A. No sir.

Q. The city of Westport has never graded or let any contract for grading Main street where this pavement was laid by the defendant company previous to the time the defendant company laid the asphalt pavement?

A. Not in the road way.

Q. Well that covered all of the portion of Main street covered by this pavement in question?

A. Yes sir.

Q. Now I will ask you generally, whether the city of Westport paid out of the general revenue fund of the city, the cost of bringing either of these three streets to an established grade?

A. Not to my knowledge.

Q. Well wouldn't you know about it if they had.

A. I would think so.

Q. You were city clerk of Westport at that time?

A. Yes sir.

Q. You recorded all of the ordinances of that city?

A. Yes sir.

Q. And signed the warrants that were issued?

A. Yes sir.

Q. And now don't you know as a matter of fact, that the city of Westport never paid one cent towards the cost of bringing any of these streets to grade?

A. No sir not for the actual work they did not.

Q. That is for the cost of bringing them to grade?

A. No sir.

Q. You know that to be a fact?

A. Yes sir.

571 By Mr. SCARRITT: "Excepting by the tax bills."

A. Well excepting by tax bills.

By Mr. FIELD:

Q. The tax bills were issued against the property facing on the street and paid by the owners or parties interested in such property?

A. Yes sir.

Q. They were not paid out of the city treasury?

A. No sir.

Q. That answer covers all three of these streets?

A. Yes sir.

Q. Main street, Baltimore avenue and Wyandotte street?
A. Yes sir.
Q. Now let us go back for a little time to Main street again. Now you say that Main street was very much washed between Main street,—between 36th and 38th streets,—and particularly between 37th and 38th streets?
A. Yes sir, that was where the worst of it was.
Q. It required some filling there did it not?
A. Yes sir it would necessarily require it, for there was quite a little ditch washed down one side of the street.
Q. Now I will ask you Doctor, if excepting the block between 39th street and Westport avenue, what was done under a city contract, that I have heretofore examined you about in taking your deposition on my side of the case,—I will ask you if excepting the block on the south side of this pavement on Main street, if there was not more or less filling to be done in the seven or eight blocks north of there, made by the defendant in 1897 in laying this pavement in question?
A. I don't think that there was very much of the street that would require filling, excepting between 37th and 38th streets. It was just about,—well it was closer to 37th than to 38th street, for between 38th and 39th streets I think the street was in a fair condition as to grade, and on further north of 36th street it was in good condition all the way through north. There was not much wash between 36th and 37th streets. Most of it was,—there was just a little kind of a hill side there on one side of the hill, and it
572 was pretty badly washed.
Q. Well now was there not a considerable number of gulches from 38th street north to 33rd street on Main street?
A. Only in the one place I think Judge.
Q. Well was not everything that was to be done in the way of grading in the execution or performance of this contract north of 38th street—was it not done by the paving company at the time of the asphalt paving?
A. I don't think so.
Q. The ordinance provided that the asphalt should be laid on a base of broken stone bringing the street up to within three inches of grade, and on top of that was to be placed three inches of a finished asphalt surface?
A. Yes sir.
Q. Well where the original surface of the street,—that is the surface of the street at the time the defendant company started to pave or sub-grade, it was their duty to bring it up to the necessary grade to do the work according to contract?
A. Yes sir, the ordinance provided for that. Where it was worn or washed away below that they had to bring it up to the required point.
Q. Whereever it was necessary to bring it up to the finished surface, the asphalt company had to do it with broken stone?
A. Yes sir, it was to be done with broken stone.

Q. Now Doctor don't you know that north of 38th street,—particularly at 36th street,—that the street was in a badly washed, worn and gullied condition at the time the pavement was constructed?

A. Yes sir, it was in bad shape I said, especially between 37th and 38th streets.

Q. And also there — some washes and gullies between 36th and 37th streets?

A. Yes sir, there were some there too.

Q. It required some filling did it not?

A. I know it did between 37th and 38th streets, and I expect it also required some at other places.

Q. Now was it not in places between 37th and 38th streets washed down below the macadam?

A. Yes sir.

573 Q. It had washed down to the clay below the macadam had it not?

A. Yes sir.

Q. That macadam pavement was put down there by the county court of Jackson county, Missouri before that part of the street came to be within the limits of the city of Westport was it not?

A. Yes sir.

Q. It became a part of the city of Westport in 1891 did it not?

A. Yes sir.

Q. And it was a poor quality of rock was it not?

A. Yes sir. That was the general opinion.

Q. It was a poorer quality of rock than that used between 39th street and Westport avenue was it not?

A. Yes sir.

Q. Do you remember when this macadam on Main street was laid by the county court?

A. Not positively, but perhaps it was in '87 I think it was about that time. Maybe it was in 1886.

Q. And you say that was a very poor quality of rock?

A. That was the general idea or opinion.

Q. It ground up into dust pretty quick?

A. Yes sir it powdered pretty badly for it was rotten.

Q. Well now was that laid before or after the street railway on Main street was put down?

A. I think it was after the tracks were constructed.

Q. Now how was that laid with reference to the track? Was it laid for instance next to where the curb was constructed or where the curb now stands?

A. How is that?

Q. Was that macadam laid even with where the curb now stands or was it even with the top of the rail, or was it below it?

A. Oh it had drainage from the center to the sides of course.

Q. Well now how much below the top of the rail, and where the curb now sets was the macadam laid by the county court?

A. Well I don't know but I suppose six inches or more. I don't know exactly but think that is the usual contour.

574 Q. Well the highest point in the street was the railroad tracks was it not?

A. Yes sir.

Q. And the top of the rail as I understand it, was the grade of the street?

A. Yes sir.

Q. As adopted by the city?

A. Yes sir.

Q. After it came into the city limits?

A. Yes sir.

Q. And the top of the curb was set even with the top of the rail, or the top of the curb was supposed to be at the established grade of the street?

A. Yes sir.

Q. Now I will ask you if that is true on each of the other streets? That is if the top of the curb represented what was supposed to be the established grade of Baltimore avenue and Wyandotte street also?

A. Yes sir the curb was set to the true grade of the street, for that was the way the ordinance provided.

Q. And the intention in the plans and specifications was to have the center of the street even with the top of the curb?

A. Yes sir.

Q. Now what do you call "practically" at the established grade?

A. Oh a variation of from six to 12 inches.

By Mr. SCARRITT:

Q. An occasional variation?

A. Yes sir.

By Mr. FIELD:

Q. You think then these streets may have been from 6 to 12 inches above or below the established grade of the streets,—the established grade and if that is the fact, yet you would call that "practically" at the established grade of the streets?

A. Yes sir, it might be 6 inches above in some places and six inches below in others, but to measure it all through it would be about at grade.

Q. Well that is what you would call practically at grade? You allow from 6 to 12 inches as a margin in your mind,—that is to say it might be from 6 to 12 inches below or above grade as the case might be, and yet you would call that practically at grade?

575 A. Yes sir, in some places it might be.

Q. You say that Main street never was graded and the grading paid for in tax bills against the adjoining property, or out of the city treasury from 39th street north to 33rd street, before the pavement in question.

A. Yes sir, from 36th street north the macadamized was repaired, and tax bills issued for it by the city of Westport.

Q. Well it never was paid for by the city of Westport?

A. No sir, not from the city treasury.

Q. It was paid for by tax bills issued against the property fronting on the street?

A. Yes sir.

Q. And you say there were some repairs made north of 36th street?

A. Yes sir. The macadam was repaired and the whole surface of the street resurfaced with broken limestone from 36th street north to 31st street.

Q. Well I will ask you if that was not done without any reference to the grade of the street?

A. Well it was finished to the grade of the street.

Q. Well I will ask you if it is not a fact that the ordinance,—whether or not the ordinance providing for that, said anything about the grade of the street?

A. That ordinance to repair the macadam?

Q. Yes sir? Did it say anything about the grade of the street?

A. I think it did.

Q. Well now ain't you mistaken about that?

A. I might be, but I don't think I am.

Q. In any event there was never anything done with the roadway between 36th street and 39th street?

A. No sir.

Q. That was paid for either by tax bills against the property, or by payment out of the city treasury?

A. No sir.

Q. Now how long were and are these blocks between 36th street and 39th street?

A. Well about 600 feet.

Q. There was a frontage of about 1800 feet on each side of Main street in the roadway, where no public work had ever been
576 done after it came into the limits of the city of Westport, other than the grading in question?

A. No sir nothing other than the grading for the sidewalks.

Q. Well that required more grading, for it was further from the established grade than any other part of the street?

A. Yes sir.

Q. Well it is a fact that there were some points that were as much as 12 inches or more from the established grade, was there not?

A. Yes sir. In some places it washed and gullied out to a depth of two feet or more, but it was not very wide you know. It was a sort of a little sluice way.

—. Now let us take Baltimore avenue. You say that was curbed and guttered just before this pavement was laid by the defendant company in 1897?

A. Yes sir.

Q. And I understand you to say that that was practically at grade?

A. Yes sir.

Q. Now what do you call "practically" at grade on Baltimore avenue? The same as on these other streets?

A. Yes sir.

Q. You would say that it was practically at grade if it was less than six inches and not more than twelve inches below the grade?

A. Yes sir that is broken up in places. If it was only at places that way. Of course I would not say that it was practically at grade if the entire length and width of the street was that much below grade, or if it was that much above the established grade I would not say the whole street was at grade; but there was just breaks in the street where it was that much or more below grade, and then again there was little humps in the street where perhaps it was a little above grade, but the larger portion of the surface of the street was practically at grade, and that is what I mean by it.

Q. Now what was it you said about the part that had never been graded by public contract,—that is the portion north of 36th street,—the three blocks north of 36th street,—from 36th street north to 33rd street you say had never been graded by a public
577 contract, and that the city never had any thing to do with the grading there, before this contract in question?

A. No sir, the city of Westport did not.

Q. When was it that Baltimore avenue was graded under a public contract?

A. From 36th street south to Westport avenue?

Q. Yes sir?

A. I think it was in 1892, but I am not positive. I can't be positive as to the date.

Q. Well I will show you a tax bill I have here, and see if that will refresh your memory?

A. You mean the grading of Baltimore avenue south from 36th street to Baltimore avenue, or is that 38th street—it is from 36th street south to Westport avenue?

Q. Yes, sir?

A. Well I see that was done in 1892. That was done under ordinance # 516 of the city of Westport.

Q. Yes sir?

A. Yes sir, that is correct.

Q. Now that is the grading that you have been talking about that was done on Baltimore avenue by public contract?

A. Yes sir.

Q. And that was all paid for by special tax bills against the adjacent property?

A. Yes sir.

Q. And none of it was done by the city of Westport?

A. No sir.

Q. And the city of Westport neither by tax bills or otherwise, ever

caused work to be done on Baltimore north of 36th street, previous to the paving of the street by the defendant company in 1897?

A. No sir.

Q. Now you say the city of Westport adopted the grade that had been made at the time it took this territory into its limits?

A. Yes sir.

Q. At that time, when this territory came into the city limits, it adopted the grade that had been made by the property owners there?

A. It adopted the grade that we found there, and I understand that it had been established by the city of Kansas City before that time.

Q. You say it was practically at grade north of 36th street, the three blocks I mean on Baltimore avenue north to 33rd street, at the time of the pavement in question?

A. I think it was.

Q. Well now was it at the grade that was first established by the city of Westport when it took that territory into the city limits
578 in 1892, or was it at a grade that was afterwards established by the city of Westport?

A. I think—well I don't know whether they ever established the grade more than the one time.

Q. They established the grade in 1892 did they not,—before this grade,—

A. South of 36th street, yes sir.—north of it the grade had never been established there, and the city did not establish the grade until later I think.

Q. W-ll there was no reason for not grading it. It was at the established grade if that be true?

A. You had to have a grade established,—there had to be a grade established in order to pave.

Q. I understand that, but you say there was no grade established at the time of this paving in 1892 north of 36th street for these three blocks?

A. There was no paving done on Baltimore avenue.

Q. I am talking about the grade.

A. No sir there was none done there. I think they went that far, and that was the only work they intended to do.

Q. Well now was the grade ever changed on Baltimore avenue between 36th and 37th streets after this grading in 1892?

A. No sir. They played ball with the grade there at 36th and Baltimore. I suppose there was half a dozen changes made. At one meeting of the council they would do something, and then before the next meeting some one would come in with some suggestion or compla-nt, and they would change it again, and then some one else would come along and they would change it again, and finally it was put back to where it was at the start, I think.

Q. Well now if there was a fill made between 36th and 37th street, and at 37th and Baltimore avenue, or at 36th street where Mrs. Shelly's property was there in laying this pavement, then very evidently it was not at grade was it?

A. Well I am satisfied that when the grading was done at 36th street and Baltimore avenue, they put it down a little to keep Mrs. Shelly from raising a disturbance. She wanted the grade lowered.

579 Q. Whom do you mean? The defendant in this case?

A. The contractor with the knowledge of the engineer, they lowered it there four or five inches.

Q. You mean in 1892?

A. Yes sir, that was done when the grading was done.

Q. Then along by Mrs. Shelley's property, the street, the surface of the street never was brought to grade?

A. Well it was perhaps six inches below grade right at her corner, but at the other side of the street it was perhaps at grade, but they made a little dip there on her side to satisfy her.

Q. Well it might have been twelve inches there might it not?

A. Well I don't know. I would not say positively, but I don't think it was that much.

Q. Well now the truth is that you are not very familiar with the grades?

A. No sir. I didn't go over it with an instrument.

Q. There was no curb there in 1897?

A. No sir.

Q. You could cast your eye over it and see that the middle of the street was even with the top of the curb?

A. No sir I could not say as to that.

Q. You are not a civil engineer?

A. No sir I never did any engineering work.

Q. You never surveyed any?

A. No sir.

Q. Now who did the shaping up of these streets for the Barber Asphalt Paving Company in the year 1897?

A. Well I could not say as to who did all of it, but I know that Mr. Patrick Moore did some of the work. I think he did it all but I do not like to say positively that he did it all. I think he did it all but I am not sure.

Q. Well he prepared the road way for this asphalt pavement that was laid there?

A. Yes sir.

Q. Who paid him for that work? The city of Westport?

A. No sir.

Q. The city of Westport did not pay any part of it did it?

A. No sir.

580 Q. Neither by warrant or tax bill issued to Mr. Moore?

A. No sir.

Q. All the tax bills you issued for it went to the Barber Asphalt Paving Company?

A. Yes, sir.

Q. So that what the Barber Paving Company received for the grading that was done on these streets for the asphalt paving, was

included in these tax bills that were issued for the paving of Baltimore avenue, Wyandotte street and Main street?

A. Yes, sir.

Q. Now don't you know Doctor that the change in the grade of this street,—I mean in Baltimore avenue,—after the grading that was done in 1892,—I am getting the number of that ordinance from the tax bill,—number 516 I think it was?

A. Yes, sir.

Q. That was the ordinance under which it was done?

A. Yes sir, that is the ordinance.

Q. Well now I will show you a memorandum which you prepared for me on one occasion and I will ask you if that does not show *show* changes in the grading of that street after the grading done in 1892?

By Mr. SCARRITT: "We object to any such a memorandum, for the reason that the ordinances are the best evidence."

By Mr. FIELD: "The defendant has examined the witness on all of these matters, and I certainly have a right to go into the same subject with him."

By Mr. SCARRITT: "I haven't given him any tissue paper pencil scratches to help him testify."

By Mr. FIELD: "I am simply giving him his own memoranda."

A. What is the number?

Q. 516 is the number of the ordinance?

A. Yes sir that is what I say when the——

Q. There was two changes of grade made there after this grading was done in 1892 was there not?

A. Yes sir.

581 Q. One was up between 36th and 37th streets, or at 36th street near Mrs. Shelley's property, and then there was another change made from 33rd street, 300 feet south or beginning 300 feet south of 33rd street was there not?

Counsel for the defendant objects to the question on the ground that it calls for secondary evidence.

A. I don't remember. There may have been. As I say, I know at 36th street,—I know that the grade was altered there several times, but it finally settled back -efore the paving was done to the original grade. I know that.

Q. Well now there were no changes made in the grade from 36th to 33rd street was there?

A. I don't know. You say there was from 300 feet south. There might possibly have been on account of Mr. Keith, but I don't know positively. I don't remember as to that.

Q. Well now which grade was established according to the established grade of the street,—I should say according to the established grade,—the surface of the street between 36th and 33rd streets, or the last grade?

A. The last one was the one that we made.

Q. The last one was the one that was made?

A. Yes sir, that was the one that was held.

Q. Well I know that that would be the one that would be legal and binding, but which was the one established,—the first, or the last?

A. Well I think it was the same thing. I remember that Mr. Keith had a little alteration made in front of his property.

Q. Well I am talking about ordinances now?

A. Well that is what I am talking about too. There was a little change made in front of Mr. Keith's property, but it would not change the surface of the street materially.

Q. Now you said in answer to Mr. Scarritt, that when Westport took in that territory it adopted the grades that were already out there?

A. Yes sir.

Q. Well you have also said in your examination, that there was nothing in the grading—that there was never any grading done at the cost of the city of Westport or by tax bills from 36th street to 33rd street?

582 A. There never was.

Q. Then if you adopted the grade,—the surface grade in the first ordinance from 33rd to 36th streets, and afterwards a change in that grade was made by ordinance, then that part of Baltimore avenue was not at grade when this defendant did the paving in 1897?

Counsel for the defendant objects to the question on the ground that it is argumentative, and calls for a conclusion of the witness, and is incompetent.

A. Why not?

Q. Well what is the way of designating a grade out there in Westport? Is it so many feet above or below the city directrix.

A. Yes sir.

Q. And all the streets out there are above the city directrix are they not?

A. Yes sir.

Q. For instance you would say that a street was 140 feet above the city directrix?

A. Yes sir. Or whatever it may be.

Q. And the next street might be one hundred and forty five or fifty feet above the city directrix?

A. Yes sir.

Q. Or it might be five or ten feet lower?

A. Yes sir.

Q. And there is a plane between the two streets?

A. Yes sir.

Q. Or a point above the city directrix might be established in the middle of the block?

A. Yes sir. Well the way the ordinance reads the grade is established above the city directrix in feet or tenths of feet. Let me see

if I recollect that, or the way its reads,—"and which point shall be connected by a true plane to such adjacent grade point."

Q. Well now this testimony you have given here about Baltimore avenue is based on information you received from the city engineer?

A. What information?

Q. About the grades there?

A. Yes sir.

Q. And it is not based on your own individual and absolute knowledge?

A. Yes sir, of course it is based on information for I never ran an instrument over any of the streets.

583 Q. That is what I say,—it is not based upon any actual or positive knowledge which you have that they were actually or substantially upon grade?

A. No sir, but if the grade stakes were set upon some of them of course I noticed the markings upon them.

Q. And the sides of the streets next to the curb were not at grade,—at these special grades,—these established grades, were they Doctor, on Main street or Wyandotte street?

A. The grading when completed left the street at grade or was supposed to do so. It was supposed to be level across the full width of the street from property line to property line.

Q. Well I am talking about the condition of Main and Wyandotte streets in 1897 at the time these asphalt pavements were ordered there by the city of Westport. The sides of the street next to the curb were not on the established grade were they, but the center of the street which had an elevation was, I understand you to say, supposed to be on grade,—the established grade?

A. Yes sir, but the paving that was done,—the ordinance providing for that, provided that the pavement should slope from the center to the curb to a certain specified distance from the top of the curb.

Q. The specifications provided for that?

A. Yes sir.

Q. And that was adopted as a part of the resolutions and ordinances?

A. Yes sir, that established it at the curb line.

Q. Well that was not the ordinance that established the grade of the street was it? That was the ordinance that provided for the asphalt paving?

A. No sir, for the grade of the street was the center of it.

Q. Now you say Wyandotte street was paved, and the center of the street was at the established grade when it was macadamized?

A. Yes sir.

Q. And how near the established grade was Wyandotte street when this pavement was laid on it?

A. The asphalt pavement?

Q. Yes sir.

A. Well I think it was practically at grade all the way through.

584 —. Well why did the ordinance provide for filling it in with broken stone?

A. I don't think it did unless it was necessary to fill,—I think the ordinance said in case it was necessary, then it was to be graded to come to that point.

Q. Then do you say that Wyandotte street was in perfect condition from 33rd street to Westport avenue?

A. How is that?

Q. I asked you if you now say that Wyandotte street was in perfect condition from 33rd street to Westport avenue?

A. Well perhaps it was not in perfect condition, but it was in good condition.

Q. There was no paving necessary at all?

A. Well that was a question for the property owners to decide.

Q. Well I mean for the purposes of the general public, was that street in good condition?

A. Well yes, I say that it was in good condition.

Q. It was in good condition, and it was a good way to travel?

A. Yes sir, and there was a good deal of travel over that road.

Q. There was no trouble about travelling it with perfect facility?

A. No sir. There was no obstruction.

Q. And it was just a question of taste as to whether or not they would have macadam or asphalt on Wyandotte street?

A. Yes sir, probably.

Q. Now Baltimore avenue is just a dirt street?

A. Yes sir.

Q. And never had a sidewalk on it scarcely only for a block or two?

A. Just two blocks out there.

Q. And never had any curb before 1897?

A. No sir.

Q. Main street was in a washed and much worse condition than Wyandotte street?

A. Yes sir and a part of it was just about as good.

Q. From 36th to 39th street for instance?

A. Yes sir. From 37th to 38th I would say.

Q. Well it was not in good condition from 36th to 39th?

A. Well in fairly good condition. It was not in as good condition some places as others, but it was in fairly good condition.

Q. It had been paved with a poor lot of macadam and
585 had had ten years on it had it not?

A. Yes sir but it was in pretty fair condition.

Q. And that was the condition, was it not,—a poor lot of macadam originally with ten years' wear on it,—from 36th street north to 39th street?

A. Yes sir it was all paved with poor rock to start with, and a part of it was not in good condition, but the block from 38th to 39th streets was in good condition?

A. Well now was there not washes and gulches between 38th and 39th street also?

A. I don't think there was to amount to any thing.

Q. It was worn a little?

A. Yes sir, ten years' traffic on that kind of a pavement will necessarily wear it some. It was not perfect by any means but it was in pretty fair condition.

Q. But you think that Wyandotte street did not need any repairs at the time the pavement was laid there. It was just a matter of taste with the property owners as to what kind of a pavement should be on it, but its pavement was not a matter of necessity? There had been no repairs made on it, and there had never been any call for any?

A. Yes sir I think it was just a matter of taste with the property owners as to whether they would have asphalt or macadam.

Q. That is the way it was,—just a matter of taste as to whether there should be asphalt or macadam on that street?

A. I suppose so.

Q. Well now on Wyandotte street, I will ask you if that rock that was laid on Wyandotte street was or was not originally a better class of rock than had been put down on Main street?

A. Yes sir, decidedly better.

Q. Excepting the block from 39th street to Westport avenue on Main street,—that is the block in front of the car barn which was as you say in good condition?

A. Yes, sir, that one block was all right.

Q. But north of there from 39th to 33rd street, was where you say this rotten rock was laid which the county court had put in?

A. Well from 36th to 31st street, the surface was good hard limestone, and from 36th to 39th street, that was what the county
586 court did, and it was not as good as it was from 36th to 31st streets.

Q. That is all.

Re-direct examination by Mr. SCARRITT:

Q. The irregularities in the surface of these streets, to which you have referred in your answer to Judge Field's questions, or his cross-examination, as I understand you were occasioned there by the wear on the pavement or the washes by the rains?

A. Yes sir, altogether.

Q. And you said, or I understood you to say, that these irregularities did not cover a great deal of space?

A. Oh no.

Q. They were just such irregularities as you would expect to find in such a pavement after that lapse of time in this climate where we have frequent rains, taken in connection with the usual amount of travel?

By Mr. FIELD: "I object to that question because it is leading and calls for an opinion of the witness, and also on the grounds given in the objection to the previous question."

A. Yes sir, just such as you would find on any road of a similar character.

By Mr. SCARRITT:

Q. I believe you stated that along the entire length of Main street that was improved, which was about a mile, you only recollect one place where the washing went below the macadam, and that was just a little sort of a cross-ditch, caused by water?

Counsel for the complainant objects to the question on the ground that it is leading.

A. It did not cross the street. It just ran down the side of the street, and it was a little ditch probably two feet wide, or two feet in dimensions, either direction. That is probably two feet in width and two feet deep.

Q. It was just a little wash out?

Counsel for the complainant objects to the question on the ground that it is leading.

587 A. Yes sir, or sluiced away.

Q. Right at the side of the street was it?

A. Yes sir.

Q. And from your observation of all these streets and the surface of them, taken in connection with the curbs, you would say that all of them were substantially on the established grade, at the time the asphalt paving contracts were executed?

By Mr. FIELD: "I object to that as leading, and because the witness has previously answered the same question."

A. Yes sir, the streets were practically at grade I would say.

By Mr. SCARRITT:

Q. That is all.

Re-cross-examination by Mr. FIELD:

Q. You mean practically as you have heretofore stated,—that is they were not more than 12 inches or less than 6 inches?

A. Yes sir, in places.

Q. Sir?

A. Yes sir in places,—I mean variations in the streets or the surface of the streets.

Q. That is all I believe.

G. L. LOVE.

Sworn to before me on the day within the hours at the place in that behalf first aforesaid and subscribed in my presence this 5th day of September, A. D. 1900.

ALFRED FIDLER,

[SEAL.] *Notary Public, Jackson County, Missouri.*

A. M. STALNAKER, of lawful age, being produced, sworn and examined on the part of the defendant deposeth and saith as follows:

Direct examination by Mr. W. C. SCARRITT:

Q. State your name and profession?

A. A. M. Stalnaker is my name, and my profession is civil engineer and surveyor.

Q. Where do you reside?

A. Here in Kansas City.

588 Q. What, if any, official position have you held in Kansas City and the city of Westport?

A. I was assistant city engineer of Kansas City in 1890 and 1891 and city engineer of Westport in 1892 and 1893 up to May 1894.

Q. Were you familiar with the condition of that part of Wyandotte street, Baltimore avenue and Main street in 1897 at the time contracts were entered into between Westport and the Barber Asphalt Paving Company for paving those streets?

A. Why as familiar as I would be with most any streets about the city without a specific examination of them.

Q. State whether or not that part of Wyandotte street on which the asphalt paving was laid by the Barber Company in 1897 had previously to that year been graded to the established grade by the city of Westport?

A. It was graded to the established grade in 1892, curbed and macadamized.

Q. Were you engineer at the time?

A. I was.

Q. Did you supervise that work?

A. I did.

Q. Was any change made in that established grade after that time and before the asphalt paving was laid?

A. I never examined the grade but I think not though. The curb was in and I do not think there was any occasion for any changes.

Q. The curb was set to grade in 1892?

A. Yes sir.

Q. I will ask you to state whether or not the asphalt paving laid by the Barber Company was laid to conform to the grade of the curbs and the established grade of that street?

A. I think it was. I have been over the street a number of times since and made surveys of lots along the streets and I never saw anything that appeared to be out of the way with the grade of the asphalt.

Q. State whether or not any portion of that part of Baltimore avenue paved with asphalt by the Barber Company in 1897 was graded by the city of Westport to the established grade be-

589 fore the asphalt paving was laid?

A. It was from 36th street south to Westport avenue graded by the city of Westport to the established grade.

Q. What year was that?
A. It was graded in 1892.
Q. Under your supervision?
A. Yes sir.
Q. Were any improvements put on the street other than the grading during your administration?
A. Only the setting of part of the curb, a small portion of the curb. The curb was started and a portion put in and then it was stopped by injunction, but no tax-bills were ever issued for that the contract never having been completed.
Q. State whether or not Baltimore avenue along the distance of the asphalt paving was graded to the established *grade from 36th* street north and if so by whom?
A. Baltimore avenue from 36th street north was never graded by the city. About the time the ground was laid out in lots the street was graded privately, that is cuts and fills were made along the street, but not to an established grade there being no established grade at that time.
Q. When was the grade established?
A. Well there was one grade established there I believe in 1891, then a later one I think in 1892,—yes, in 1892 there was a little change made in that grade.
Q. Was the last grade established during your administration?
A. I think it was.
Q. You may state whether or not the last grade established conformed to the surface of the street.
A. Very closely. There was a little cut in places and a little fill in other places and another question came up as to whether it would be necessary to grade the street before we paved it or not and the council asked me for an opinion on it.
Q. State whether or not you made an examination of the street for the purpose of determining whether or not it was substantially on the established grade?
A. I examined it at that time, yes sir.
Q. What condition did you find it in with reference to the
590 established grade?
A. I reported it would not be necessary to grade the street in order to pave it, that it would not be more expensive to the contractor to take it in its present condition and sub-grade it than it would be if it were fully graded to the established grade.

Complainant moves to strike out the answer of the witness as incompetent, irrelevant and immaterial and the mere opinion of the witness.

Q. Did you have a profile of the street made for the purpose of determining that question?
A. We had one in the office already. I did not make one at the time, we had one already.
Q. You may state now from your examination and knowledge of

the situation whether or not the surface of the street was substantially upon the established grade.

Complainant objects to the question as incompetent and immaterial. He may state what was the grade and how much, if any, the surface of the street is different from the established grade.

A. I reported to the council that it was substantially on grade. That was my report at the time.

Complainant moves to strike out the answer for the reason in addition to those in the objection, that it is not responsive to the question.

Q. *You will just have to answer my question.* (*Question read.*)

A. Yes sir, it was.

Q. State whether or not the whole length of Baltimore avenue along which the asphalt paving was laid was paved and guttered by a different contractor from the paving contractor before the asphalt paving was laid?

A. I do not know that of my own knowledge, but then paving contractors don't very often take curbing contracts. They are separate contracts under different ordinances, so if it was the same contractor they would probably do it under different contracts

591 at least.

Q. Do you mean to say you do not know who the contractor was?

A. No I do not know.

Q. State whether or not the curbing and guttering was constructed along the street named prior to the time the paving was laid?

A. I can only give my recollection of it.

Q. You have seen it?

A. Yes sir, and as far as looking at it is concerned I should judge it was at the established grade.

Q. You may state, Mr. Stalnaker, whether or not the curb and gutter and the asphalt pavement were placed on the surface of the street as it existed at the time those improvements were constructed?

A. Do you mean at the time that the contracts were let?

Q. Yes.

A. No, it is necessary to sub-grade a street before you can pave it, take out the dirt where you find it to a certain depth below grade and then fill up with your pavement and that is necessary in all paving contracts, if that is what you mean.

Q. Is it customary and usual in all paving contracts for the subgrading to be done as part of the paving contract?

Complainant objects to the question as immaterial and irrelevant.

A. Yes sir, it is.

Q. What I am endeavoring to find out is whether or not the top of the asphalt pavement when constructed was substantially at the same elevation as the surface of the street before the work of paving was begun?

A. Well in preparing a street for the pavement it is necessary to get out the earth where it is too high to make room for the pavement, and in the case of Baltimore avenue, not having been graded to the established grade there were some places too low and some places a little too high, so it was necessary to fill some places and cut some places to bring it to the proper elevation to receive the pavement, and that is undoubtedly what was done.

592 Q. To what extent did the surface of the street vary from the established grade?

A. I do not think it varied to the extent of more than one or two feet in any place and that one or two feet was generally a fill.

Q. Do you mean where there had been washes or something of that sort?

Complainant objects to the question as leading.

A. Yes sir.

Q. You may state whether or not the total amount of earth removed on Baltimore avenue by the paving contractor exceeded the amount required to be removed by the terms of the paving contract in order to make the sub-grade?

Complainant objects to the question as calling for the conclusion of the witness and it is not shown that he knows what amount of earth was removed in the grading done and besides it is not a matter of expert testimony. It is a matter that there can be specific statements on and it is the province of the court to decide.

A. My opinion is that the amount of work necessary to be done would be less than if the street had been graded to the established grade.

Q. You would say then that taking the surface of that entire part of Baltimore avenue on which the pavement was laid as a whole it was substantially on the established grade of the street prior to the time the paving was done?

Complainant objects to the question as leading.

A. I think so.

Q. You may state whether or not Main street along the distance improved by the asphalt pavement in the city of Westport was substantially on the established grade of the street at the time this asphalt pavement was constructed?

593 Complainant objects to the question as calling for the conclusion of the witness.

A. It was on the established grade, that street was curbed by the city of Westport.

Q. Under your administration?

A. It was finished under my administration. It was pretty nearly finished when I went there and I finished it.

Q. Do you remember the street car tracks along that street?

A. Yes sir.

Q. What position did they occupy with reference to the established grade?

A. The established grade was made to fit the street car tracks.

Q. That is the established grade conformed to the elevation of the tracks?

A. Yes sir.

Q. And the curbing that was set under your administration, as I understand you, was set to the same grade?

A. Yes, that was completed under my administration.

Q. Was the street macadamized?

A. It had been macadamized by the county from 39th street north before the city took it in.

Q. Do you know whether the macadam was laid subsequent to the construction of the railway tracks?

A. I do not know which was constructed first, the macadam or the railway tracks, but they really conformed to each other,—they would conform to each other.

Q. As I understand you then Main street prior to the time the asphalt pavement was laid along the surface the railway tracks and pavement and curb were all laid to the established grade?

Complainant objects to the question as calling for the conclusion of the witness.

A. Yes sir.

Q. You may state whether or not the asphalt pavement was constructed to the same grade.

594 A. Why yes, I noticed it a great many times and I see it fits the car tracks all along that street.

Q. Also the curb lines?

A. Yes sir.

Q. Well you may state if you will whether or not the surface of Main street along the distance improved by the asphalt pavement was substantially upon the established grade of that street at the time the paving contract was executed?

(Same objection)

A. Yes sir.

Q. Take the witness.

Cross-examination by Mr. FIELD:

Q. Do you mean to say, Mr. Stalnaker, that the surface of Main street in 1897 immediately before the asphalt pavement thereon, was the same in altitude as after the laying of the asphalt pavement?

A. Substantially so.

Q. What do you call substantially so, how many inches or feet?

A. Well that is rather an indefinite proposition. The car tracks are the established grade.

Q. That is the highest point in the street?

A. The curbs, the top of the curb is the same elevation of the

pavement in the center of the street should be and the street rounds and makes a gutter at the curb, and of course that macadam had been used for several years and of course was worn down some.

Q. And washed?

A. And in two places was washed a little.

Q. Where was it washed?

A. On the east side of Main street between 35th and 36th and on the west side of Main street between 37th and 38th.

Q. Was it washed out as much as the macadam in those places?

A. It was washed out fully as deep as the macadam as far down as 38th street.

Q. Was not the macadam worn between 38th and 39th?

595 A. That old macadam was worn.

Q. The surface was worn between 38th and 39th?

A. Between 36th and 39th. It had been laid a number of years before by the county and got badly worn.

Q. It had never been repaired?

A. No sir.

Q. The city of Westport had never done any work on the roadway between 36th and 39th?

A. Not on the roadway.

Q. That was the washed and badly worn condition of Main street that you have testified to?

A. Yes sir.

Q. Now how deep were those gullies that you testified to?

A. I think probably they went to the bottom of the macadam,—a foot or 15 inches deep.

Q. What do you call substantially at grade,—what would be the maximum of inches or feet of variance of the surface of a street that you would call practically at grade?

A. That would depend a little bit on what was to be done with the street.

Q. I mean Main street at these points between 36th and 39th for instance.

A. If I was going to pass on the street as being complete I would want them to be within one or two inches of the grade before I would call it substantially at grade, but if we were going to pave I would call it substantially at grade if it were dug out as low as the sub-grade will go or even lower.

Q. How much lower?

A. To the extent of another foot, because it would not cost the contractor any more to put in that foot than it would to take out a foot.

Complainant moves to strike out the last part of the witness' answer as not responsive to the question.

Q. Can you state definitely what was the difference, if any, between the surface of Main street before the pavement in 1897 laid by the defendant and after the pavement, in altitude?

A. No, I do not know how much the macadam was worn out in the street.

596 Q. Well can you give the maximum and minimum of altitude?

A. Well along the street car tracks it must have been as high as the street car tracks, which would be up to grade. In those little gullies I spoke of in those two blocks it may have been 12 or 13 inches below grade at the bottom of those gullies.

Q. Where were they?

A. This deepest one was between 37th and 38th?

Q. How long was it?

A. A couple of hundred feet maybe.

Q. How wide?

A. Oh, a couple of feet at the top.

Q. Someone said something about the curbing falling in next to that gully,—do you know anything about it?

A. No, I never saw it fallen in, I do not.

Q. Now were there any other gullies besides that one?

A. The top of the macadam was washed out on the east side of Main street between 35th and 36th, the water accumulating there washed off the top of the macadam but not to the bottom.

Q. Well how much would you say was washed off there?

A. Six or eight inches.

Q. Of the original surface of the macadam?

A. The repaired macadam. We repaired that portion of the street and that part we put on washed off the old macadam for four or five feet wide.

Q. How long was that wash?

A. I think for thirty or forty feet.

Q. The street would have ten years' wear between 39th and 31st on the macadam that was put in by the county court?

A. It was put in by the county court but I do not know what year it was put in.

Q. From 36th to 39th it had the wear of ten years?

A. I do not know when they did put it in?

Q. Was it worn all the way or just partly?

A. Well I suppose it was worn all the way generally because the street got just about the same amount of travel except just a little bit at the north end.

597 Q. The grade of Main street as I understand was the top of the car tracks?

A. The top of the slot rail.

Q. That is the highest point in the street?

A. Yes sir.

Q. The surface of the street as it stood in 1897 and has always stood was not up as high as the established grade of the street next to the curb?

A. No sir, that was rounded off from the car track to a six inch gutter at the curb.

Q. That was always below the established grade, it never was higher?

A. No sir, it never *it*.

Q. In paving a street or macadamizing a street it always makes the street next to the curb from five to six inches below the established grade?

A. That is the intention.

Q. It is not so in grading a street unless the plans and specifications call for that,—they generally grade it out to a level?

A. No, they generally make a ditch the way it is curved.

Q. That is because the plans and specifications call for it?

A. Yes sir, when they call for it.

Q. So when you say Main street was at the established grade you mean the center of the street car tracks?

A. Yes sir.

Q. The roadway on either side of the car tracks to the curb was gradually below the grade from the car track to the curb?

A. Yes sir.

Q. To six inches below the grade of the street?

A. Yes sir.

Q. And the washouts that you testify about between 36th and 39th streets were then the depth of the washouts below the six inches next to the curb?

A. Yes sir.

Q. Now you testified about some work on Main street, some repairs between 36th and 31st street of the macadam,—was that paid for out of the general fund of the city of Westport or by tax bills issued?

A. Tax bills.

Q. Tax bills that were paid by the owners of the property?

A. Yes sir.

598 Q. The city of Westport never paid any of the expenses of the roadway between 31st and Westport avenue?

A. Not to my knowledge.

Q. Whatever was done was paid for by tax bills against the adjacent property?

A. Yes sir.

Q. And while you were there the custom that you testify to of charging the cost of reducing it to grade to property owners was followed before paving and there was nothing whatever requiring it to be paid for out of the general fund of the city?

A. I don't know about that.

Q. That came in 1895, that provision of the city charter?

A. That is new to me.

Q. There was no provision requiring the city to pay anything out of the general revenue fund of the city. It was all done by tax bills from 1892 to 1894 while you were there?

A. I think so.

Q. Now all work you have testified to on Main street, Baltimore

avenue and Wyandotte street was likewise paid for by tax bills issued against the property along the street?

A. It was.

Q. And none of it was paid for out of the general revenue fund of the city?

A. None.

Q. When did you say to Mr. Scarritt that you would consider a street practically at grade,—how much might it be above or below?

A. If you are speaking of preparing it for paving I would consider it practically at grade when it was in that condition that it did not require the paving contractor to do more work in preparing his sub-grade than if the street had been graded to the established grade.

Q. In other words your idea is that if he took no more out of the street than he was required to put in you would count the street practically at grade before he began? For instance take Baltimore avenue, suppose the paving put in including the concrete and everything was six and a half inches,—now if he had to
599 excavate six and a half inches from one end to the other to put that in,——

A. Or put in six and a half inches from one end to the other,—then I consider it would be the same as a cut of six and a half inches because it would cost him just the same as to take out six and a half inches. It is the same to take out six and a half inches as it is to fill in six and a half inches.

Q. Do you mean to say that a street that is six and a half inches below grade that requires a fill, do you mean to say that is practically to grade?

A. Yes, I am speaking of the paving,—unless it requires the contractor to do more work than he otherwise would do.

Q. Now take the work, if it requires you to fill in six inches of earth or stone would not it cost that much more than if you did not have to put it in?

A. If he had to put in six inches it would not cost more to put it in than to take it out.

Q. Suppose the finished surface of the pavement is to be 150 feet above the city directrix,—now suppose the amount of paving including the concrete that goes in amounts to 6½ inches. We will say that that street or that block is then 149 feet above city directrix so that you have got five and a half inches of fill to put in there of earth in addition to the paving, to bring it to the proper surface. Do you mean to say that that would not cost any more?

Defendant objects to the question as incompetent, irrelevant and immaterial, calling for the mere opinion and conclusion of the witness and not based on any facts in this case. The witness has testified that Baltimore avenue was substantially on grade, at some places the surface probably was a little above and others a little below the established grade but on an average it was about grade.

A. I think it would not cost the contractor to put in five and a

half inches of dirt as much as it would to take out six and
600 a half inches that was there in his way.

Q. That is not answering my question. (Question read.)

A. I do. It would not cost as much to put in that 5½ inches as it would to take out 6½ that was already in it.

Q. This is my supposition,—that you have a street here now that has the grade fixed 150 feet above the city directrix and the street grade 149 feet above the city directrix, and a paving of six and a half inches and below that there is a fill of five and a half inches,—now I ask you in making that fill of 5½ inches below the pavement, if that would not cost more than if you did not have that 5½ inches?

A. But wouldn't you have to set the street up to it? It will cost more to put in that five and a half inches than it would if you did not have to put in any.

Q. That is what I said,—and yet you would consider a street the surface of which was 5½ inches below the established grade as practically at grade?

A. You are trying to mix my answers up Judge.

Q. No sir, I am not, but I do not intend my questions shall be confused either.

A. Well in the first place let us suppose a street is on the established grade and consider what the contractor has to do?

Q. I cannot accept your supposition because it is not in this case,—what I mean is what do you mean by "practically at grade," how many inches it might vary?

A. I mean I consider a street practically at grade if the contractor did not have to do more work to prepare the sub-grade than if he found the street on the established grade, absolutely on the established grade.

Q. Well this is an engineering opinion is it, or an opinion from the standpoint of a contractor, you are giving, or is it a legal opinion?

A. I would consider it an opinion from an engineer's standpoint if he was getting ready to pave a street.

Q. Now, Mr. Stalnaker, suppose the specifications for Balti-
601 more avenue read like this, there shall be a concrete pavement of four inches as a base to the pavement, a binder course of an inch and a quarter and add to that a wearing surface of an inch and a quarter making it in all six and a half inches, a pavement of 6½ inches in depth from the surface to the bottom,—what would you say would be the amount of excavation to be taken out from the established grade of the street if the grade was the surface of the street, to put in that pavement?

Counsel for defendant object to the question because complainant has not stated the contents of the contract or the specifications with reference to the excavation of the sub-grade.

A. Six and a half inches.

Q. Well then if an average of 12 inches was excavated from 33d street to the north line of Westport avenue, the entire pavement in

question on Baltimore avenue, I say if an average of a twelve inch cut was made over the whole street in order to accommodate a pavement of six and a half inches, I will ask you to state what you would say as to whether the surface of Baltimore avenue was at the established grade at the time of the putting down of the pavement?

A. Not if there is an average of that much.

Q. It would be your judgment that if there was a cut of 12 inches to accommodate a pavement of six and a half inches in depth, that it was not substantially at grade?

A. Not if it was an average of that much.

Q. You are quite clear of that are you?

A. That is in line with my opinion all the way through.

Q. Then you would not think a cut of five and a half inches below the six and a half inches, to prepare for that kind of a pavement, would be substantially at the established grade?

A. No sir.

Q. In your opinion the surface of that street was not at the
602 established grade if an excavation of twelve inches was necessary to be made to accommodate the six and a half inches depth of the pavement?

A. I would not.

Q. Now I will ask you if there wasn't a change in that grade of Baltimore avenue after your administration in 1892?

A. A change of one foot at 36th street.

Q. Where?

A. Well I think it commenced at nothing at 35th and became a foot at 36th and ran out to nothing at 37th.

Q. Was that a fill or excavation ordered by that change?

A. I believe it was an excavation.

Q. Wasn't it a fill?

A. No sir, the grade was changed from 201 to 200.

Q. Did I understand you to say that the street in 1892 had been graded by some property owners?

A. Yes sir, north of 36th.

Q. Did it stand at grade in 1892 north of 36th?

A. Very closely.

Q. How near?

A. My recollection is that it did not vary more than a foot or fifteen inches, something of that kind, from the established grade line.

Q. Was it above that much or below, from the grade line?

A. It was generally below, but there was some places there was a little cut. There was a little cut between 35th and 36th.

Q. How much below grade was it?

A. I do not think over a foot at any point, it did not average that much.

Q. How much did it average in the three blocks?

A. I do not know exactly, but I reported to the council it would not be necessary to do extra grading.

Q. I do not care for your opinion.

A. That was my opinion, but I do not exactly remember the exact profile, but I remember looking up the question.

Q. You do not recollect how many inches or how many feet?

A. I do not think it was two feet at any point. I think
603 that one foot would cover any excavation or embankment.

Q. You think it would be an average of one foot?

A. No, I do not think it would be an average of one foot, I think the extreme would be that.

Q. Above or below?

A. Either above or below. Some places a little above and some places a little below.

Q. Then it was never on the established grade?

A. It never had been graded by the city to the established grade. It had been graded privately by the property owners.

Q. You never measured it?

A. We made a profile in order to establish the grade.

Q. You say there were mostly fillings north of 36th?

A. That is my recollection.

Q. Now I will ask you to look at this ordinance at page 325.

By Mr. SCARRITT: I object to the witness stating the contents of the record because the ordinance itself is the best evidence of the established grade.

By Mr. FIELD:

Q. Now can you tell me what changes were made in that grade of Baltimore avenue after you graded it in 1892?

Counsel for defendant objects to the question as calling for secondary evidence, the ordinance itself being the best evidence.

A. These two ordinances do not cover the same part of the street, these two that you have just called my attention to.

Q. I called your attention to ordinance 763, and I will ask you if the grades as established in that ordinance was the surface of the streets at that time, September 28th, 1892?

A. Practically so.

Q. How much difference between what is named and the reality?

A. I do not think to exceed a foot either below or above the grade.

604 Q. Look at page 146 and see if that will aid you in any way to tell. Now this ordinance 505 I show you is the ordinance that fixed the grade of the street at the time you graded it, is it not?

A. Yes. This is the established grade I believe.

Q. This one?

A. Yes.

Q. 505 is the ordinance under which you graded it in 1892?

A. I think so.

Q. Now what change was made from ordinance 505 to the next ordinance?

A. One foot at Thirty-sixth street.

Q. Where else?

A. That is the only one on that part they graded.

Q. I am not talking about the parts you graded but the parts you didn't grade as well,—what change was made?

A. There is no change except that one at 36th street between that and this other. This ordinance here only covers from 35th to 37th.

Q. Two blocks?

A. Yes sir.

Q. And it made a difference of a foot?

A. One foot at 36th. It ran out at each end.

Q. Was it made a foot lower or a foot higher?

A. A foot lower.

Q. Now there was another change of the grade of the street from ordinance 505 north of 36th street there after the time you graded south of there wasn't there? Now what is the difference from Grand boulevard to 35th for instance, *unless* this last ordinance of September 28th, 1892, and the last ordinance under which you graded part of Baltimore avenue?

A. There is two feet difference at a point 300 feet south of Grand boulevard, but this changed grade was in effect when I made my report to the council, it was after this grade that we passed the ordinance. It is this later grade I made my report to the council on.

Q. Which is nearer the surface of the grade?

A. This last grade. I can tell you the reason for that change if you want to know it.

Q. Did you measure that to get a level?

605 A. I know the conditions there because I gave Mr. Keith his grade line to set his curb there.

Q. How much above or below grade according to this last grade did you say?

A. I do not believe it was six inches either way.

Q. Was it above or below?

A. It was above because I believe Mr. Keith had to lower his curb. The old established grade was too high and they passed an ordinance to lower it. It made it very near the surface of the street, that change did.

Q. You admit if I understand you if there was an average cut on Baltimore avenue in this grading of Mr. Patrick Moore in the execution of this contract with the Barber Company in 1897 of 12 inches to prepare the street for the pavement of six and a half inches in depth and the present surface of the pavement is at the established grade, then that grading in 1892, and the balance of the streets you did not grade couldn't have been at established grade?

A. The streets we did grade we did put on the established grade, but the others not having been graded I could not say.

Q. If there was a cut on Baltimore avenue between 33d street to Westport avenue of an average of 12 inches to accommodate a pavement of six and a half inches depth then you admit that?

A. I believe that it was not quite on established grade then.

Q. As an engineer you state you would not consider it on the established grade at that time?

A. Yes sir.

Q. Now what was the condition of Wyandotte street in 1897 at the time this asphalt pavement was laid there?

A. It had been macadamized.

Q. When was it macadamized?

A. I think in the summer of 1892.

Q. Paved and macadamized in 1892,—I mean graded and macadamized.

A. Grade-, curbed and macadamized, probably all in 1892.

Q. Was that a good job?

A. I consider it so.

606 Q. How much macadam was laid on that street?

A. 12 inches.

Q. Twelve inches deep?

A. Yes sir.

Q. Was it worn out at the time this pavement was put on in 1897?

A. Not worn out I would not consider it,—it might have been worn some.

Q. How much was it worn?

A. It might have been four or five inches worn, I don't think more than that.

Q. You think there was no point where it was worn more than five or six inches?

A. I would not think so.

Q. And some places not worn at all?

A. Some places where the dirt was washed on it between 35th and 36th I do not expect it was worn that much.

Q. Was it a good street for travel?

A. Yes sir, after we paved it all the travel went over on that street instead of Main street.

Q. That was on account of the washed out condition of Main street wasn't it?

A. Well partially so, but there was no street-car track to bother travellers.

Q. The street car tracks are on Main street now are they not?

A. Yes sir.

Q. Mr. Scarritt has shown that Main street is the great street coming in from Westport out there.

A. Well it is a good street.

Q. Don't yo- know that the reason they left Main street and travel went to Wyandotte street was because the macadam was washed out on Main street?

A. Well there is no question but what it was better on Wyandotte street.

Q. Now for the purpose of travel and convenience of travel was there any necessity for paving Wyandotte from 33d to Westport avenue in 1897?

A. Why I do not suppose the macadam was worn out on Wyandotte street, I suppose that was in good condition yet.

Q. You mean the macadam was perfectly good at the time it was paved with asphalt?

607 A. I suppose it was in good condition. I do not suppose it was worn over four or five inches.

Q. Was it worn out in gullies on Wyandotte street?

A. I never noticed any place excepting a few feet down by Westport avenue.

Q. How many feet, fifty feet?

A. I think fifty feet would cover it. I do not think it was hardly fifty.

Q. The balance of Wyandotte street which was about a mile was in good condition in 1897 at the time this asphalt pavement was laid there?

A. Well I suppose it was. I do not recollect examining it

Q. Well you know as much about that as you do about what the grades of these asphalt pavements were?

A. Yes sir.

Q. Well don't you know it was in good condition?

A. Oh, I do not know. I think it was.

Q. Where do you live?

A. In the 10th ward.

Q. Were you out there then?

A. Only when I had occasion to make a survey.

Q. Well you testified to the surface of the streets?

A. I never noticed the paving being in bad condition.

Q. Do you know of it needing any repairs or improvements there?

A. No sir.

Q. You never noticed anything making it inconvenient for travel there between 33d and Westport avenue?

A. No sir.

Q. What is the usual life of a macadam street?

A. I do not believe this stone we have in this country will last to exceed eight years, a foot of macadam.

Q. Well asphalt isn't guaranteed but five years. Now all this work that was done out there was paid for by the property fronting on the street?

A. Yes sir.

Q. And not one cent paid out of the city treasury of the city of Westport?

A. No sir.

Q. That you ever heard of?

A. No sir.

Q. That is all.

608 Re-direct examination by Mr. SCARRITT:

Q. State whether or not the average cut or fill on Baltimore avenue necessary to construct the sub-grade between 36th street and the north end of the pavement exceeded over six inches?

A. I do not believe that it would.

Q. And you base that opinion on the profiles, surveys and examination made by you in order to advise the council whether or not it was expedient to pass a grading ordinance?

A. Yes sir.

Q. That is all.

Re-cross examination, by Mr. FIELD:

Q. You were not out there at Westport at the paving of these streets, during the progress of the work?

A. This asphalt work, no sir.

Q. You do not know actually how much grading and sub-grading was done by the contractor?

A. No sir.

Q. How long since you had anything to do with those streets?

A. Three years.

Q. Had you been out there to pass by during those three years?

A. Nothing only being out there to make surveys on lots.

Q. You had observed that Main street was out of repair and Wyandotte street was in good condition during those three years?

A. I observed Main street was washed a little some places a foot or fifteen inches deep.

Q. That was when? Don't you know there were a great many little differences in the surface of the street?

A. Yes sir, the street was not exactly smooth.

Q. And travel had gone over to Wyandotte street as you have testified?

A. Yes sir.

Q. You do not know how much earth was actually taken out on either of those streets or actually put in in preparing for
609 those pavements?

A. There could not have been on Main street or Wyandotte street—those two streets had already been macadamized with stone.

Q. Now these ordinances, don't you know they call for fills of broken stone?

A. These ordinances call to put in a base of broken stone.

Q. Why would they specify broken stone to be filled in there if there were no gullies or places where fills were necessary to bring it to three inches below the surface of the paving?

A. Filling up there and smoothing the old macadam took the place of putting down the concrete which formed the base for the pavement.

Q. Now do you know what is the fair cost of four inches of concrete pavement?

Defendant objects to the question as immaterial and irrelevant.

Q. What that kind of work cost usually, a four inch base of concrete per square yard?

A. I do not believe I am competent to testify on that.

Q. After all the public work you superintended in Kansas City?
A. Yes, I know, but that part was not cut loose from the other parts in their bids.
Q. Don't you know that part of the work was let out and done by other people except the ones who did the paving?
A. No sir, they buy the stone and put it down themselves.
Q. Don't you know what they pay for that kind of work?
A. I may have been told but I do not know it of my own knowledge.
Q. What per cent. would you say as an engineer that that was of the cost of the work, the concrete?
A. The four inch concrete?
Q. Yes sir, and the six and a half inch cut?
610 A. I can't cut them apart, the concrete and the upper part of the pavement.
Q. Do you know anything about asphalts?
A. I never studied them particularly to know the cost.
Q. Do you know the different asphalts?
A. Yes, Trinidad is prepared different from the Utah.
Q. The Utah is a rock asphalt?
A. Yes sir.
Q. Did you ever see the California asphalt?
A. I believe Walnut street was paved with California asphalt near 18th and 19th and Twentieth.
Q. Is that a pitch asphalt?
A. No, I believe that is a rock asphalt.
Q. When was that?
A. I think along 1891 or 1892 or 1893.
Q. What other kinds of asphalt do you know except the Trinidad Lake?
A. That is the only one.
Q. What is land asphalt?
A. I do not know.
Q. You thought the only asphalt was Trinidad Lake?
A. No sir.
Q. What asphalt does this Barber Company lay?
A. Trinidad Lake.
Q. Did you ever know them to lay anything else?
A. No sir.
Q. You say you are not very familiar with asphalts?
A. No sir.
Q. You do not pretend to be an expert then in asphalts?
A. I do not.

Re-direct-examination by Mr. SCARRITT:

Q. Mr. Stalnaker in your examination and testimony with reference to this grade on Baltimore avenue had you reference to the last established grade on that street?
A. It does.

Re-cross-examination by Mr. FIELD:

Q. Well there were some changes after you graded the street?
A. There was a change of one foot there at 36th.
611 Q. At thirty-seventh?
A. There was no change made at 37th.
Q. It was 36th?
A. Yes sir.
Q. It was lowered?
A. Lowered one foot.

A. M. STALNAKER.

Sworn to before me on the day within the hours at the place in that behalf first aforesaid and subscribed in my presence this 6th day of September, A. D. 1900.

ALFRED FIDLER,
[SEAL.] *Notary Public, Jackson County, Missouri.*

At this point the defendant by its counsel asked that the taking of these depositions be adjourned until to-morrow, July 17th, 1900, to which complainant objected.

UNITED STATES OF AMERICA, } ss:
State of Missouri, County of Jackson, }

I, Alfred Fidler, a notary public within and for Jackson county, State of Missouri, do certify that in pursuance of an agreement waiving formal notice of the taking of these depositions, came before me at the law office of Scarritt, Griffith & Jones, in the American Bank building, Kansas City, Jackson county, Missouri, Patrick Moore, George L. Love and A. M. Stalnaker, who were by me severally sworn to testify the truth the whole truth and nothing but the truth touching their knowledge of the matter in controversy aforesaid; that they were examined and their examinations reduced to writing in shorthand by myself in the presence of the witnesses respectively, on the days, within the hours, at the place in that behalf first aforesaid; that thereafter said shorthand notes were by me transcribed on the typewriter as above set forth and said depositions were subscribed by said witnesses respectively in my presence at the time above certified to.

I certify that complainant and counsel for defendant were
612 present at the taking of these depositions and agreed to the taking thereof without notice formerly given. I certify that I am not counsel, attorney or relative of either party to this cause or otherwise interested in the event of said cause.

I have retained the said depositions in my possession for the purpose of returning the same exhibits thereto attached to the court for which said depositions are now herewith returned.

Given under my hand and notarial seal this the 28th day of July, 1900. My commission expires November 14th, 1902.

ALFRED FIDLER,
[SEAL.] *Notary Public, Jackson County, Missouri.*

Notary's fees (Orr & Fidler), $31.00 paid by defendant.

Witness fees:

Patrick Moore, 1 day	$1.00
George L. Love, 1 day	$1.00
A. M. Stalnaker, 2 days	$2.00

613 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant.

Depositions.

UNITED STATES OF AMERICA,
State of Missouri, County of Jackson, } ss:

Depositions of witnesses produced, sworn, and examined on the 2nd, 3d, 4th, and 6th days of August, 1900, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of said days, at the law offices of Richard H. Field, in the New York Life building, Kansas City, Jackson county, Missouri, before me, Alfred Fidler, a notary public within and for Jackson county, Missouri, in a certain cause now pending in the circuit court of the United States for the western division of the western district of Missouri, between Richard H. Field, complainant, and The Barber Asphalt Paving Company, defendant, on the part of the complainant.

Appearances.

Mr. Richard H. Field, the complainant, appeared personally.
Messrs. Scarritt, Griffith & Jones appeared for the defendant.

At this point it was agreed by and between the parties complainant and defendant to this action that these depositions taken by Alfred Fidler and John N. Orr be taken in shorthand and be by them respectively transcribed on the typewriter and when thus transcribed they be subscribed by the respective witnesses and when thus subscribed that they be of the same force and effect as if they had been taken in longhand and subscribed by the respective witnesses immediately after the taking of the same.

And the said witnesses, each one of them being of lawful age, and having been by me first cautioned and sworn to tell the truth the whole truth and nothing but the truth, in the matter in controversy aforesaid, I did with the assistance of counsel, carefully examine the said witnesses, and they did thereupon depose and say, respectively, as follows:

614 JAMES B. McGOWAN, of lawful age, being produced, sworn and examined on the part of the complainant, deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. Give your name and age and place of residence?
A. My name is James B. McGowan and I am residing now at 1743 Jefferson street, Kansas City, Missouri.

By Mr. E. L. SCARRITT: I have not had anything to do with this case or the examination of any of the witnesses and my brother, W. C. and Col. Griffith have had entire charge of it on the part of the defendant, and Col. Griffith is now absent in Kentucky and W. C. Scarritt was called to Sioux City on an important matter late yesterday afternoon subsequent to the time he received the notice to appear here this morning to take Mr. McGowan's deposition. I will ask Judge Field to postpone the matter until tomorrow morning at ten o'clock when he will appear and continue the examination.

By Mr. FIELD: At his request, Mr. McGowan, I suppose you will appear here tomorrow morning at ten o'clock?
A. Indeed I will.

(The witness is excused until ten o'clock tomorrow morning.)

Not being able to complete the taking of these depositions on this day by and with the consent of the parties plaintiff and defendant to this action I adjourn the further taking thereof until to-morrow morning, the taking thereof to be then resumed at the same place and within the same hours mentioned in the caption hereof.

Given under my hand and notarial seal this the 2nd day of August, 1900.

____ ____,
Notary Public, Jackson County, Missouri.

Pursuant to adjournment as above stated on this 3d day of August, 1900, between the same hours mentioned in the annexed notice, commencing at the hour of ten o'clock in the forenoon of this day, and at the same place heretofore named, counsel for all parties complainant and defendant being in attendance, I resumed the taking of these depositions as follows:

615 JAMES B. McGOWAN, of lawful age, being produced, sworn and examined as aforesaid, in continuation of his deposition commenced yesterday, further deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. How long have you resided in Kansas City, Missouri?
A. Nearly 17 years.
Q. How old are you?
A. 36 years of age.
Q. You came here when you were 19 years of age?

A. Yes sir.
Q. What relation are you to Hugh McGowan?
A. I am his brother.
Q. I did not hear that.
A. I am his brother.
Q. How much older or younger is he than you?
A. I think he is about seven years, no, he is about six years,—he is about 42 years old now.
Q. Six years older than you are then?
A. Yes sir.
Q. Are you connected with the defendant, The Barber Asphalt Paving Company, at this time?
A. Yes sir, I am associated with Hugh McGowan. He is the western agent of the Barber Asphalt Paving Company.
Q. What do you mean by the western agent?
A. He has charge of the affairs of the company in the West.
Q. What States?
A. As I remember, Ohio, Indiana, Illinois, Michigan, Kansas, Missouri, Kentucky. I think Tennessee and Nebraska, Wisconsin, Iowa, Minnesota,—that is as near as I can recollect now. I think it embraces about twelve or thirteen States.
Q. And he has general supervision of all those States as I understand, for the defendant?
A. Yes sir.
Q. How long has he had such power and supervision for the defendant?
A. Why I think about two years.
Q. Then this arrangement began sometime in 1898?
A. I think that is right.
Q. Was that before or after he did this work, before or after the Barber Asphalt Paving Company did this work on Main street,
616 Baltimore avenue and Wyandotte street in question?
A. It was after.
Q. Now what were his relations to the defendant before 1898?
A. I think he had charge of the State of Missouri. I know he had charge of Kansas City, Kansas, or, I mean Kansas City, Missouri, and I think the State of Missouri.
Q. Well what do you mean by having charge of Kansas City, Missouri, and the State of Missouri?
A. He was the agent of the Barber Asphalt Paving Company.
Q. Their general representative you mean?
A. Yes sir.
Q. He was the chief man here to consult about any matter, was he?
A. That is my understanding of it.
Q. That is before 1898, during 1897?
A. Yes sir.
Q. And of course that included Westport, Missouri?
A. Yes sir.

Q. Now Westport, Missouri, join- before taken into Kansas City, to Kansas City on the south side?

A. Yes sir.

Q. The streets numbered in Kansas City, or did in 1897, from one to thirty or thirty-one?

A. 31st I think was the boundary. The center line of 31st was the old line of Kansas City and the dividing line as I remember it, the dividing line of the two towns.

Q. Then 32nd street and so on south increasing in numbers, were in Westport?

A. Yes sir.

Q. Those streets run east and west?

A. Yes sir, the numbered streets run east and west.

Q. Up to about 48 or 49 in Westport?

A. I think so sir.

Q. And Main street, Baltimore avenue and Wyandotte street were three parallel streets within a block of each other running north and south across these numbered streets?

A. Yes sir.

Q. In other words the streets in Westport as in Kansas City, those were named that ran north and south and numbered that ran east and west?

A. Yes sir.

Q. And First street began on the north side and increased
617 in numerical number the farther they went south and crossed the town east and west?

A. Yes sir.

Q. Now in 1897 when these three streets were paved you say Hugh McGowan was the general agent of the company in Kansas City, Missouri, and for Missouri?

A. Yes sir, I think so.

(Each of the foregoing questions is objected to for the reason that the subject of the inquiry is not pertinent to the issues in this case and is not pertinent to the order under which this testimony is taken. The testimony is taken under the order of the court last made and since the complainant has closed his examination or testimony in chief, and is therefore incompetent, irrelevant and immaterial on the issues now under consideration, and the defendant moves to strike out all foregoing testimony of this witness for the reasons now stated.)

Q. When did Hugh McGowan begin in the service of the defendant?

A. I think it was either 1891 or 1892 Judge.

Q. You mean 1891 or 1892?

A. Yes sir.

Q. In what capacity did he begin then?

A. As agent.

Q. I mean with what powers?

A. The same powers as I presume he exercised.

Q. So far as Kansas City and Westport were concerned?
A. Yes sir.
Q. Well can you specify what the nature of his duties were as imposed upon him by the defendant?
A. Why they are varied Judge.
Q. Well if you can state them I would like to have them.
A. His duties were varied. I do not know that I could answer from the start and enumerate them clear down the line.
Q. Have you been associated with him since he began in the service of the company?
A. No sir.
Q. When did you begin?
A. About three or four years ago, about four years ago.
618 Q. Well that would be about the year 1896, would it?
A. Yes sir,—no, let's see,—yes, I think that is correct.
Q. You began in 1896?
A. It was either 1895 or 1896.
Q. In the early part of 1896?
A. It was about the first of June I remember, about the first of the summer.
Q. What did you do in connection with Hugh McGowan and the defendant?
A. Well my duties were varied too. I assisted in the procuring of contracts and circulation of petitions and other matters incidental to the business.
Q. Incidental to what?
A. Incidental to the business, the procurement of work.
Q. Did the Barber Company have one or two offices here in Kansas City during the times past you have named?
A. The Barber Company had one office.
Q. How is that?
A. The Barber Company had one office and, practically, Hugh had his own rooms because they were more convenient.
Q. I do not want the reasons.
A. We tried to get together. The construction office has always been in the Gibraltar building and we tried to get together but could not get together with suitable rooms, we were cramped.
Q. The construction office was in the Gibraltar building?
A. Yes sir.
Q. In 1897 and 1896?
A. Yes sir.
Q. Where was Hugh McGowan's office in 1897?
A. In the Temple block.
Q. Where is it now?
A. It is in the Waterworks building.
Q. Well this office maintained by Hugh McGowan, is it at his own individual expense, or the expense of the company?
A. His own expense, I guess.
Q. Who is paying the rent now to this office in the Water-
619 works building?

A. I pay it now.

Q. Who pays you?

A. He pays me.

Q. Well the defendant does not pay the expense of running this office?

A. I do not know. I do not know what arrangement Hugh has.

Q. You do know it is a separate office?

A. The reason we have one in one building and one in another is because we cannot get suitable rooms in that building.

Q. Has not it been very hard to get tenants in that building?

A. No sir.

Q. I wanted to refresh your memory.

A. It is a non-essential matter.

Q. You have nothing to do with the construction office in the Gibraltar building?

A. No sir.

Q. They keep a bookkeeper and cashier?

A. Yes sir.

Q. And what other employees do they keep over there?

A. Why they keep the employees to run the office that are usually kept around any office where there is considerable business done.

Q. Considerable business?

A. Yes.

Q. Do they have anything to do with procuring contracts in the construction office over there?

A. Why they participate in it, yes sir.

Q. What duties?

A. We work together in details.

Q. Is that duty assigned to your office or their office?

A. We work together but we perform our functions and they theirs.

Q. Well what do they do in getting contracts?

A. Mr. Demerest is superintendent and he has power to contract, he signs the bids, and Mr. Peck is the cashier.

Q. Does he have anything to do with procuring the contracts?

A. He does sometimes. We work together.

620 Q. I want to know what he does?

A. Well he helps out.

Q. What does he have to do?

A. For instance correspondence coming in here or if property owners want a petition to pave a street he would either call me up or get out the petition himself, or get out a contract for private work.

Q. You say you have nothing to do with paying the rent of that office?

A. No sir.

Q. Do you know who pays the rent?

A. I presume the Barber Company.

Q. Who paid the rent of the office of Hugh McGowan from 1891 or 1892?

A. Well I paid it for the last one or two years as I said.

Q. Who paid it before you did?
A. Well I presume he did.
Q. Did you ever see him give a check for it?
A. I think I have.
Q. Did he maintain an office before he went to the Temple block?
A. Yes sir, I think when he first started here the World's Fair Commission had an office here and he transacted the World's Fair business and Barber business all there.
Q. Well what business did the Barber Asphalt Paving Company have that was done at the office maintained by Hugh McGowan, that was done at that office?
A. Well I think I stated in a general way, attempted to get work, circulated petitions, attempted to procure and did procure contracts for the paving of streets.
Q. What material do the Barber Company use in paving streets?
A. Trinidad Lake.
Q. Any other?
A. Not that I know of.
Q. What other material did the Barber Company ever circulate petitions for except Trinidad Lake?
A. I never knew it to circulate for any other.
Q. Who were those petitions circulated among?
A. Among the property owners of property fronting on the street.
621 Q. In Kansas City and Westport?
A. Yes sir.
Q. Petitioning the council to require the work to be done?
A. Yes sir.
Q. Similar to those you circulated out here in Westport for the work in question, were they?
A. I think that is right.
Q. Now when did you circulate those petitions, was it before the work was declared necessary by the council or after it was declared necessary?
A. I think the petitions were generally circulated before the work was declared necessary.
Q. And when you got the proper number of resident signers you would take it to the city authorities?
A. Well it would be taken there I presume by the property owners or some of our people.
Q. You do not mean to say that the property owners ever took the petitions of either one of those three streets in question to the council?
A. I would not say that.
Q. Or that they were present?
A. I think they were present or some of their agents.
Q. Do you mean to say the property owners maintained an agency to circulate petitions?
A. No, I do not say that Judge. I think though that some of the

property owners were present at some meetings I have attended, or their agents.

Q. Did you ever ask them to be present?

A. No sir.

Q. In regard to any of the three pavements in question?

A. No sir.

Q. Can you give me the names of any agents present at meetings on any of the three streets in question?

A. I think Mr. Tate was there and I think some of the other property owners.

Q. Tate is the only one you recollect?

A. Yes. It has been a long time and I did not specially charge my memory with it.

Q. Were you at the meeting?

A. Yes sir, some of the meetings.

Q. What were you doing at that meeting?

622 A. I went to see what was going on.

Q. Well what did you do?

A. I do not know that I did anything.

Q. Did you speak with any aldermen?

A. I do not know whether I did or not.

Q. Were you acquainted with any of these aldermen of Westport?

A. Some of them.

Q. Did you speak with any of them about these petitions that were coming up for paving these streets?

A. I do not know. It has been a long time and I did not attempt to charge my memory.

Q. What were you doing, Mr. McGowan, out there, can you tell that?

A. I went out to attend the meeting.

Q. What did you do that for, what purpose?

A. Well my object was, I presume, to see what was to be done with the work.

Q. What was to be done with those petitions?

A. Yes sir.

Q. The petitions were to be presented before the ordinance came up?

A. Yes sir.

Q. Do you remember Messrs. Scarritt, Griffith & Jones writing up one of those petitions?

A. No sir.

Q. Do you remember of Mr. Love having any of those petitions signed by the property owners?

A. I do not know, I do not recollect.

Q. Can you remember whether you spoke to any of the aldermen before the meeting or after the meeting about this work?

A. I do not remember.

Q. Anything you said, was it before the council would meet or after the meeting?

A. Well I presume if I knew a man I would speak to him any time I would see him.

Q. I want to know your habit?

A. I do not think I had any fixed habit on that, and I do not think any man on earth had. If I know you I am apt to speak to you anywhere I meet you.

Q. Well is it natural that you went out there and did not say anything to any alderman about work, you just went out and stood around?

623 A. It might be and might not be.

Q. Well did anybody else go out to assist you?

A. There might be.

Q. Well who?

A. I do not remember.

Q. Who else was in the employ of the office of Hugh McGowan at that time?

A. Well, I think Mr. Norris and myself.

Q. And Getty?

A. Yes sir. I do not say they were there or not. There might have been meetings there wasn't anybody there.

Q. You would not go out there at any meetings without speaking to aldermen when these things were coming up, would you?

A. I might.

Q. Was your presence enough?

A. I do not know.

Q. It was well known by the aldermen that you were connected with the Barber Asphalt Company?

A. I do not know what they knew.

Q. Well it was pretty well known you represented the Barber Asphalt Paving Company?

A. I presume it was well known I represented that company.

Q. Well if you were there they would know you were there representing that company?

A. Well it would be an assumption on my part to state what they knew.

Q. Well who paid you for your work in procuring contracts?

A. Why I generally when I wanted any money I generally got it from my brother.

Q. Hugh McGowan?

A. Yes sir.

Q. I mean in 1897 and before then?

A. My brother.

Q. Who paid Getty and Norris?

A. My brother.

Q. You mean Hugh J. McGowan?

A. Yes sir.

Q. He had charge of procuring contracts here for the company?

A. That was among his duties, yes sir.

Q. During that time in 1897 and before then the Barber Company paid you all for your services?

A. Well I could not say directly they did. I received my compensation from Hugh.

Q. A salary?

624 A. Well Hugh McGowan has given me a good deal of money in my life, he has been a sort of a father to me. If I wanted ten dollars or any amount I could go and get it.

Q. Does he pay you a salary?
A. No stipulated salary.
Q. In commission?
A. No stipulated commission.
Q. What salary or commission was paid to Mr. Getty?
A. I do not know.
Q. Was it salary or commission?
A. I presume it was a salary.
Q. $75.00 or $100.00 a month?
A. I do not know.
Q. What salary or commission was paid Mr. Norris?
A. I do not know.
Q. Was he a married man?
A. Yes sir.
Q. And Mr. Getty?
A. He was a single man.
Q. Who did the work of the office?
A. Mr. Norris did part and Mr. Getty part and Hugh part.
Q. You kept books at your office?
A. I could not say we did that,—I presume Hugh did.
Q. Do you keep a set of books there now?
A. No.
Q. What has become of those books that you kept at your office in 1897 and before then?
A. I do not know what he did with them.
Q. Have you any books at your office now?
A. No records.
Q. I do not mean records, I mean books.
A. What do you mean by books?
Q. I mean expense account?
A. No sir.
Q. What rent was paid for these offices maintained by Hugh McGowan?
A. Well Judge I think that is a private matter, we pay out rent, but I think that is going into private affairs.

By Mr. SCARRITT: You need not answer the questions. Counsel for the defendant advises the witness that the matters now inquired about are wholly immaterial to this suit and he may decline to answer.

By Mr. FIELD:

625 Q. Was Hugh McGowan engaged in 1897 and prior to that in 1896 in any other business except theBarber Asphalt

Paving Company?
A. I think he had some private business.
Q. I mean outside of that employment did he have any other?
A. No, I think not other than his own private affairs.
Q. You mean his own private property?
A. Yes sir.
Q. Now do you decline to tell me what rent you paid?
A. No, I do not. I think we paid forty dollars rent.
Q. In the Temple block?
A. Yes sir.
Q. Who paid it?
A. I think Hugh did, I have seen him write checks.
Q. You had no understanding the Barber Asphalt Paving Company paid it?
A. I had no understanding they paid it direct. I do not know what arrangement they had with Hugh.
Q. Did you ever see the contract between Hugh McGowan and the Barber Asphalt Paving Company?
A. No sir.
Q. You are his own brother?
A. Yes sir.
Q. And you work for him without any stipulated salary or compensation?
A. Yes sir.
Q. And you think a good deal of him?
A. More than any other man on earth, and I presume he does of me also as much as any man can think of another.
Q. You do not know what they pay him?
A. No sir.
Q. Do you know whether it is a salary or commission?
A. I do not know that.
Q. Did you ever hear him say?
A. No sir, I never did.
Q. Is there any arrangement in your office with you at the present time for compensation per square yard of work obtained?
A. I do not understand that question.
Q. Does the Barber Company compensate you per square yard of work obtained?
A. I work for H. J. McGowan as I said.
626 Q. They compensate him?
A. Yes sir.
Q. And you do not know how?
A. Yes sir.
Q. And he pays these other assistants?
A. I pay them, and I presume he pays them.
Q. And he pays you?
A. He pays me a lump sum of money any time I ask.
Q. He gives you a lump sum of money and from that you pay the salaries of these promoters you employ?
A. Yes.

Q. How many do you employ?
A. I think we have four men in the office now.
Q. How much do you pay them?
A. I decline to answer that unless I have to. I am willing to accommodate you and tell anything I know but I think there ought to be a limit.
Q. If you will tell me what compensation Mr. McGowan gets that will be enough.
A. I cannot tell you that.
Q. You decline to tell what compensation these four men are paid?
A. I decline to tell you that.
Q. Who are these four men you employ at this time?
A. Well A. A. Whiting, Mr. Guy Holmes, Mr. William Norris and Mr. A. G. Lackey.
Q. Well I will ask you this question,——

By Mr. SCARRITT:

Q. And they go all over the country wherever you send them?
A. Yes sir.

By Mr. FIELD:

Q. And you decline to say how much you pay them?
A. Yes sir.
Q. And did you state whether you paid them a commission?
A. I do not want to say anything about that.
Q. And you decline to say whether you pay them a commission or salary?
A. Yes sir.

By Mr. FIELD:

Q. Well I shall ask Judge Philips to make you answer
627 that question.
Q. Now as I understand you you first circulated a petition among the resident property owners to get their signatures?
A. I have testified to that.
Q. And then you take that petition to the city authorities and ask them to declare that work necessary?
A. Yes sir.
Q. And that is the beginning?
A. Yes sir.
Q. And that is the method you employ in procuring contracts?
A. Yes sir.
Q. And that is the same method that was in vogue in 1897?
A. Yes sir.
Q. The same method that is in vogue now was in vogue then?
A. Yes sir.
Q. Hugh J. McGowan does not reside here now?
A. He has a residence here.
Q. Where is he now?

A. I do not know whether Indianapolis or Cincinnati.
Q. What does he do now?
A. He is president of the Indianapolis street railway.
Q. You say he still maintains his residence here?
A. Yes sir.
Q. Are his family here?
A. I think they are up on the lakes somewhere now.
Q. You mean to say he does not intend to give his home up here but he maintains a residence at Indianapolis?
A. Well that is my idea, he maintains a residence there,—this is his home. You catch my idea?—but temporarily he is abiding at Indianapolis.
Q. And he is president of the street railway there?
A. Yes sir.
Q. You came here when you were seventeen you say?
A. Nineteen.
Q. Did you come here with Hugh McGowan?
A. Nineteen,——
Q. Did you come here with Hugh McGowan?
A. I came here afterwards.
628 Q. Your brother was a policeman here?
A. Well he commenced as a street car driver and graduated.
Q. He was a policeman after he was a street car driver or conductor?
A. Yes sir,—well I do not think that is material.
Q. When was he a policeman?
A. I think in 1880.
Q. He was a patrolman in 1880?
A. Yes sir.
Q. He was on the force how many years?
A. About six.
Q. And then he was elected county marshal of Jackson county?
A. Yes,——
Q. He was elected two terms as county marshal of Jackson county, wasn't he?
A. Yes sir.

By Mr. SCARRITT:

Counsel for defendant moves that the testimony of this witness as to the biography of himself and Hugh McGowan be striken out and the cost of this testimony be assessed and charged against the complainant.

By Mr. FIELD:

Q. What year did he go out of office as county marshal?
A. I think in 1890.
Q. It was in '92 Jim?
A. No, it was 1890. 1888 was the time he last was elected.
Q. I will ask you the question again and I want an answer and I

shall bring it before Judge Philips if I do not get an answer,—if he had not grown to be quite a factor in politics here and if he has not been such?

By Mr. SCARRITT:

Objected to. It is a question of expert testimony and he has not qualified to give his opinion on such matters.

A. I will follow my attorney's advice on the question.

By Mr. FIELD:

Q. I insist on an answer to this question.

629 By Mr. SCARRITT: Well we have answered it all we are going to. The witness on advice of counsel declines to answer the question.

By Mr. FIELD:

Q. I will ask you if Hugh J. McGowan, your brother, has not taken quite an active part in politics in Kansas City since 1890?

A. Well I will decline to answer that Judge for the present.

Q. I will ask you if your brother has not shaped or assisted in shaping largely Democratic politics in Kansas City, Jackson county and western Missouri from 1890 to the time he went to Indianapolis a few months ago?

By Mr. SCARRITT: On advice of counsel he declines.

By Mr. FIELD:

Q. Well let him decline.

A. Well I decline to answer it.

By Mr. FIELD:

Q. Well do you decline to answer the question because you are unable to answer it or on the advice of your counsel?

A. On the advice of my counsel.

Q. I will ask you if your brother Hugh McGowan has not been regarded — Kansas City generally since 1894 to the time he left here as a most potent and influential man before municipal bodies in Kansas City and Westport?

By Mr. SCARRITT: Decline to answer.

A. Well I decline to answer on advice of counsel.

By Mr. FIELD:

Q. Not because you do not know but on advice of counsel?

A. I decline to answer that question on advice of counsel.

Q. Do you remember,—oh, first I will ask you who laid the pavement on Main street, I mean north Main street,—I do not
630 mean the Main street in question,—we will say Main street in Kansas City from Missouri river to Seventh street?

A. The Barber people did, I think.
Q. What year was that?
A. About seven or eight years ago.
Q. It was about eight years ago, I have the date exactly,—was your brother working for them then?
A. I think he was.
Q. Was any other company laying asphalt here at that time?
A. Well I do not remember whether they were or not.
Q. Well your company came in here first to lay asphalt regularly, I believe?
A. I think that is so.
Q. Well which one came in afterwards?
A. I do not remember that, Judge.
Q. I mean asphalt generally.
A. Well I do not know.
Q. Well there was no other paving company you can recollect in 1892 except the Barber?
A. I do not remember whether Church and Company were here then or not.
Q. Who?
A. Church and Company.
Q. Laying asphalt?
A. Yes sir.
Q. What kind of asphalt did they lay?
A. I do not know Judge.
Q. There has never been any company laid Trinidad Lake except your company, has there?
A. The Parker-Washington claimed to have.
Q. You contested the ability of the Parker–Washington to lay it?

By Mr. SCARRITT: You need not answer that question.

By Mr. FIELD:

Q. I insist on answers to these questions. You have no right to direct this witness what to say.
A. Judge nobody can direct me how to testify.

By Mr. FIELD:

Q. I say, didn't you contest the ability of the Parker-Washington to furnish Trinidad Lake asphalt?

631 By Mr. SCARRITT: You need not answer that question unless you want to.

A. I decline to answer that Judge,—but not to be disrespectful.

By Mr. FIELD:

Q. You do not decline because you do not know?
A. I decline because my counsel tells me to.
Q. Do you know anything about any suits brought by property

owners to keep the Parker-Washington from getting contracts on bids specifying Trinidad Lake asphalt?

A. I believe some property owners did that?

Q. Who were they?

A. I forget, there were quite a number. It is a matter of public record here.

Q. What did you or the Scarritts or Hugh McGowan have to do with those suits to prevent the Parker-Washington from getting contracts specifying Trinidad Lake asphalt?

A. I do not know of my own knowledge,—Mr. Scarritt is here and he can tell you.

Q. Did the Barber Company have anything to do with the institution of those suits to your knowledge?

A. I do not know Judge.

Q. Did you hear any talk with him that anything of that kind was done or going to be done that the Barber was backing any of these suits?

A. It has been a long time ago,——

Q. 1897,—you can certainly say whether you heard Hugh say anything about these property owners contesting?

A. I do not think I can say.

Q. That is the best answer you can give?

A. That is about the best. They are matters of public record and can be ascertained.

Q. Do you know anything about the Barber Company paying the costs of those suits?

A. I do not know anything about that.

Q. Or promising to pay the costs?

A. No sir.

Q. Now along in 1892 and along in there what were the specifications in these petitions and ordinances?

632 A. I was not connected with the company then.

Q. Well what was the specifications in these petitions while you were connected with it?

Counsel for the defendant objects to the question as calling for secondary evidence.

A. I decline to answer on advice of counsel.

Q. I will ask you if in a single one of the petitions you circulated beginning in '95 or '6, in your time of service, I will ask you if there was any specification asking for anything other than genuine Trinidad Lake asphalt?

By Mr. SCARRITT: You can answer that.

A. I wish you would state that question (question read).

A. I think the majority of the petitions I looked over were for Trinidad Lake.

Q. Well what else did you circulate for?

A. I never did for anything else.

Q. In your office?

A. I do not know of anything else.
Q. You do not know of anything being asked for excepting genuine Trinidad Lake asphalt?
A. I do not know of any.
Q. They were similar to the petitions circulated in these three cases?
A. I can say all I know of they were for Trinidad Lake asphalt.
Q. Now you have had some competition with other brands of asphalt here, haven't you?
A. I have always supposed there was a general competition here all the time Judge.
Q. I mean on other brands of asphalt?
A. There are several other brands in the field.
Q. There is an Indian Territory asphalt laid by the Gilsonite people?
A. Yes sir.
Q. How long have they been here?
633 A. Three or four years I think. They have been in the field about four years. That can be ascertained.
Q. That would be in 1896 then,—are you any judge of asphalt?
A. I am not an expert.
Q. Where does this Trinidad Lake asphalt come from,—do you know anything about that?
A. Only in a general way.
Q. It goes through some refinery in New York before you use it here?
A. I suppose it is refined.
Q. I see the specifications call for the refined asphalt and I suppose it has to be refined somewhere?
A. I suppose it is all refined. All foreign matters I suppose were taken out of the liquid asphalt.
Q. Where is asphalt found?
A. In tropical countries.
Q. There is no scarcity of it?
A. I suppose not Judge.
Q. In Venezuela they have any quantity of it?
A. I suppose so.
Q. And in California?
A. Yes sir.
Q. And in Utah?
A. I think they have a quantity there.
Q. How long have you known this asphalt?
A. Since I took charge.
Q. In 1896?
A. Yes sir.
Q. Where is it used if you know?
A. In all the cities of the United States, I suppose. I have understood it is used universally.
Q. Do you know in what proportion they use it with sand and petroleum and other things?

A. No sir, I do not know what proportion.
Q. All refined asphalt is the same?
A. I suppose the refined asphalt is.

By Mr. SCARRITT:

Q. The refining does not change the proportions?
A. No sir, as I understand it you take the foreign substances out.

634 By Mr. FIELD:

Q. Whatever brand of asphalt it is it leaves the pure asphalt?
A. Yes sir.
Q. I believe you can examine.

By Mr. SCARRITT:

Q. That is all.

By Mr. FIELD:

Q. I do want to ask you one more question about Hugh McGowan as he is not here. Has Hugh McGowan been here very much during the last three or four months?
A. No sir, he has not.
Q. Has he been here much?
A. He has been here during convention week and he has been here three or four times during the last six months I suppose.
Q. How long does he stay?
A. The last time he staid from Monday morning to Saturday night.

By Mr. SCARRITT: (No examination.)

The defendant moves to strike out all the testimony of the witness J. B. McGowan for the reason that under the order of the court by virtue of which this testimony is being taken, it is incompetent, irrelevant and immaterial, and moves the court to have the costs of taking the testimony taxed against the complainant.

JAMES B. McGOWAN.

Sworn to before me on the day, within the hours at the place in that behalf first aforesaid and subscribed in my presence this 15 day of September A. D. 1900.

ALFRED FIDLER,
[SEAL.] *Notary Public, Jackson County, Missouri.*

JAMES H. HARKLESS, of lawful age, being produced, sworn and examined on the part of the complainant deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. State your name, residence and business?
A. James H. Harkless, Kansas City, Missouri. Attorney at law.
Q. Are you a member of the firm of Harkless, O'Grady & Crysler, and were you in the year 1897?

A. Yes sir.

Q. Do you remember filing some suits in the circuit court
635 of Jackson county, Missouri, at Kansas City, one in the name of Joseph Lorie, plaintiff, and one in the name of Jennie Henrici, plaintiff, and one George Eberle, plaintiff, against the Parker-Washington Company, and the members of the city council and city engineer of Kansas City, Missouri, in October, 1897, and January, 1898?

Counsel for defendant objects to the question as leading and calling for secondary evidence.

Q. Injunction suits to prevent Kansas City from letting certain contracts to the Parker-Washington Company for paving Tracy avenue, Park avenue and 17th street?

(Same objection.)

A. Yes sir.

Q. Is this the petition that was filed in the case of Joseph Lorie?

A. Yes, that is the original petition.

Q. You filed that, did you?

A. Yes, that is our firm did.

By Mr. FIELD: I want to read in evidence parts of the petition in the Eberle case.

Counsel for defendant objects to same as incompetent, irrelevant and immaterial.

(*Petition.*)

In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, January Term, 1898.

GEORGE EBERLE, Plaintiff,
vs.
THE PARKER WASHINGTON COMPANY, JAMES M. JONES, Mayor; R. J. Johnston, W. W. Morgan, Geo. Eyssell, H. C. Morrison, C. N. Munson, J. E. Jewell, John T. Seddon, L. E. Wyne, P. S. Brown, Jr., and Geo. S. Graham, Members of the Upper House, and James Pendergast, Julius Wolf, S. B. Hough, R. D. Craig, James W. Beroth, John P. Lynch, N. P. Simonds, Frank Brinkley, James G. Smith, and A. D. Burrows, Members of the Lower House, of the Common Council of Kansas City, Missouri. } No. —.

Petition for injunction.

Plaintiff for cause of action against the defendants states that the is, and was at all the times hereinafter referred to, the owner of the following described land, situate in the county of Jackson
636 and State of Missouri, to-wit: The east fifty (50) feet of lots four (4), five (5) and six (6), in block I, Ransom and Talley's

addition, being one hundred thirty five (135) feet on Tracy avenue in Kansas City. That defendant, The Parker-Washington Company is a corporation duly created and existing under and by virtue of the laws of the State of West Virginia; that J. M. Jones is the mayor of Kansas City, a municipal corporation acting or exercising authority under the terms of a special charter adopted pursuant to the provisions of the constitution of the State of Missouri; that the other defendants herein named are members of the common council of the said Kansas City, the first named ten being members of the upper house, and the last named ten persons being members of the lower house of said Kansas City; that the said Kansas City, by and through its mayor and common council heretofore duly enacted an ordinance entitled "An ordinance to pave Tracy avenue from the south line of Sixth street to the north line of Ninth street," which ordinance was approved September 3d, 1897, by the terms of which it is provided that the said Tracy avenue *to* be paved between the points aforesaid with a genuine Trinidad Lake asphalt pavement, in accordance with the plans and specifications therefor, referred to in said ordinance; that thereafter, the engineer caused to be published for ten successive days next preceding the time for opening bids, in the newspaper doing the city printing, a notice of the letting of the contract for the work required to be done by the terms of the said ordinance to the lowest and best bidder, which said notice stated generally the nature of the work to be done, and where the plans and specifications therefor might be found, and the day when bids for such would *would* be opened, viz: September 25th, 1897; that upon the date so fixed, the defendant, The Parker-Washington Company and the Barber Asphalt Paving Company, a corporation, both having first duly qualified therefor as required by the ordinances of Kansas City, became the bidders for the doing of said work by signing a written bid therefor and enclosing the same in a sealed envelope directed to the said city engineer and delivered to him, the said engineer, which bids were opened at the date fixed therefore, as aforesaid, by the said engineer in the presence of the members of the committee of the common council on public improvements; that section 993 of the general ordinances of Kansas City, entitled, "An ordinance under the provisions of an ordinance governing the city of Kansas City," enacted on the 12th day of May, 1888, as subsequently amended, provides and is as follows:

"Bids shall be opened on the day fixed at eleven o'clock a. m. and the lowest and best bidder shall be accepted by the said engineer and said committee, or the member or members thereof then present; provided, however, that the said engineer or other person acting, may reject any and all bids if deemed too high, or the parties bidding are considered irresponsible."

That thereafter the engineer of said Kansas City illegally and in controvention of the ordinance aforesaid did pretend against the express wish and votes of the members of the said committee to accept the bid of the defendant, The Parker-Washington Company, for the doing of said work; that a large majority of the said committee did de-

termine and declare that the said defendant, The Parker-Washington Company, was not the lowest and best bidder for the said work and a large majority of the said committee did not accept the said bid of the said defendant for said work, and plaintiff says that the bid of the said defendant for said work has never been accepted by the city engineer and the said committee or the member or members thereof present at the time of the pretended letting of said work, and that the said work has never been legally let by the engineer and said committee to the said defendant.

637 And plaintiff further states that the ordinance aforesaid and the specifications for the work therein referred to provide that the said work and improvement shall consist of a genuine Trinidad Lake asphalt pavement to conform in all respects to detail I of asphalt pavements, approved by the board of public works of October 27th, 1896, and now on file in the office of the said board, except that the concrete base shall be four inches thick instead of five inches as therein specified. The total cost of the pavement shall not exceed the sum of two and 25/100 dollars per square yard. The pavement to be constructed of such material and in such manner that it shall indure without the need of any repairs for a period of five years from the completion thereof.

That the said detail, so referred to, requires that the matrix of the said asphalt pavement shall consist of refined Trinidad Lake asphaltum; that the defendant, The Parker-Washington Company, has caused a form of contract to be prepared between the city and the said defendant for the doing of said work, and has caused the same to be executed on behalf of the city by the said engineer, its form approved by the city counsellor, and the sureties on such contract to be approved by the city comptroller, and has submitted the said contract to the common council of Kansas City for its approval; that the said common council and the members thereof named herein as defendants, have or are about to approve the said contract.

Plaintiff states that by the terms of the said ordinance and contract the work therein provided to be done is required to be paid for by the issuance of special tax bills against the real property abbutting upon that part of the said Tracy avenue to be paved as aforesaid, on which said Tracy avenue the real property of the plaintiff hereinbefore described abuts and that when the said work is done a tax bill will be issued against the land of the plaintiff hereinbefore described to pay such a proportion of the entire cost of such work as the frontage of plaintiff's land upon the part of said avenue to be improved as aforesaid bears to the total frontage of private property thereon.

Plaintiff further states that the defendant, The Parker-Washington Company, although it has bid upon said work under the specifications requiring the pavement to be laid with refined Trinidad Lake asphaltum, it does not intend or propose and will not if permitted to do the said work lay the said pavement, or the matrix thereof with refined Trinidad Lake asphaltum; that the said de-

fendant company has no refined Trinidad Lake asphaltum on hand or has not a sufficient amount of that material with which to do the work aforesaid; that the said defendant, the paving company has, by certain false affidavits and statements misled and deceived the engineer of Kansas City and the members of the common council of said city and has by reason of such false affidavits and statements caused the city engineer and the members of the common council to believe that the said company has in its possession a sufficient amount of Trinidad Lake asphaltum to execute the work aforesaid, and that it is the purpose and intention of that company so to do.

Plaintiff states that the said engineer and members of the common council have not made any examination and have not the appliances in their possession with which to determine whether or not the asphaltum in possession of the said defendant paving
638 company and with which it intends to pave the avenue aforesaid, is refined Trinidad Lake asphalt.

Plaintiff says that it is the purpose and intent of the said defendant paving company to execute the work of paving aforesaid with a kind and quality of asphalt different from and inferior to, as a paving material and cheaper in price than the refined Trinidad Lake asphaltum, and thereby in fraud of the rights of the property owners owning real property abutting on said avenue, and of the mayor and common council of Kansas City.

Plaintiff states that he brings this suit in his own name and in his own behalf, but for the benefit of any and all property owners owning real property abutting on said avenue similarly situated to himself, who may desire to join in this action and contribute to the cost of prosecuting this suit; that unless the defendants are enjoined and restrained from doing said work that part of the avenue aforesaid will be encumbered with a defective and useless street pavement, the contract and specifications for the doing of said work will be violated and the property of the plaintiff and of the persons similarly situated will be encumbered and the title thereto clouded by the lien of special tax bills issued in payment of the said work and a multiplicity of suits will occur and the plaintiff and other property owners similarly situated will suffer irreparable injury.

Wherefore plaintiff prays the court to issue its writ of injunction permanently enjoining and restraining the defendants from approving the said contract or from doing any work thereunder or of executing any of the work provided to be done by the terms of the ordinance, and that in the meantime the defendants be temporarily enjoined from so doing and for such other and further relief as to the court may seem just and equitable in the premises and for the costs of suit.

(Signed) HARKLESS, O'GRADY & CRYSLER,
Attorneys for Plaintiff.

(The following was endorsed on the back of said petition.)
No. 31000. Div. # 2. George Eberle, *vs.* The Parker-Washington

Co. *et al.* Petition for injunction. Filed Oct. 7, 1897, H. M. Stonestreet, clerk, by C. C. Byers, D. C. Paid $3.00 Gleason

639 By Mr. FIELD:

Q. You filed a like suit you say for Jennie Henrici and Joe Lorie, that is in their names?

A. Yes sir.

Q. The other two suits are just the same as the petition I read in evidence?

A. Practically the same.

Q. Proceeded on the same ground?

A. Yes sir.

Q. The Lorie case and the Eberle case were filed October 7th, 1897, I believe?

A. Yes sir.

Q. And the other case was filed in January, 1898?

A. Yes,—whatever that file mark is.

Q. The Lorie case involved what street?

A. 17th, I think.

Q. And the Everle case involved Tracy avenue?

A. Yes sir and the Henrici case involved Park avenue.

Q. Different ordinances and different bidding and different contracts for each street?

A. Yes sir.

Q. Do you remember or know of the file mark of three dollars paid by plaintiff marked on the back of one of these petitions?

A. I could not tell you a thing about it now. I remember some of them I filed myself and some by other members of the firm.

Q. Did not you file those three petitions yourself?

A. They were filed from our office. The matter of the docket fee I do not know anything about.

Q. You were the member of the firm that took care of those cases?

A. I tried them.

Q. Mr. O'Grady and Mr. Crysler had nothing to do with them?

A. No sir, nothing only members of the firm.

Q. I mean you had charge of the suits?

A. Yes sir.

Q. Who employed you in these cases, Mr. Harkless?

A. Well to start with I think I brought one suit in my own name on Tracy avenue and out of that grew the Eberle suit. I was personally interested in the matter on Tracy avenue and those

640 two suits were brought, one by me and the other I brought for Mr. Eberle who is my neighbor there.

Q. Who paid the costs in those cases?

A. I do not know a thing about it for I do not know what they are.

Q. You say you brought a suit also yourself in your own name?

A. I think so.

Q. Are you sure about that?

A. I am not certain. I know I prepared a suit in my own name for my own street.

Q. Are you certain you filed the suit?

A. I am not certain. I know I had a petition to file.

Q. Did you receive a fee in the Eberle suit?

A. That is a matter I decline to answer.

Q Did you receive a fee from any other person than George Eberle for the work you did in this suit filed in his name?

A. I have no recollection of ever having done so.

Q. Why do you decline to answer the question as to who paid you for your services?

A. Because I decline to state any arrangement we had with our clients or what they were.

Q. If the costs were paid in the cases you do not know what they were?

A. Well I never looked to see. One of the cases was tried.

Q. What case was that?

A. I think it was the Tracy Avenue case.

Q. Where was that tried?

A. One was argued before Judge Slover and one before Judge Gates and I think Judge Slover decided the one argued before him first and I think Judge Gates afterwards followed that decision.

Q. There were two cases then before Judge Slover?

A. Well I do not remember.

Q. It was the case of Eberle *vs.* Parker-Washington, *et al.*, 31000, that was tried before Judge Slover?

A. Yes sir.

Q. Who assisted you as attorney in that case?

A. I do not remember of having any assistance.

Q. Don't you remember that William C. Scarritt, the gentle-
641 man sitting here, made an argument in that case?

A. Well possibly he did, I do not know now about it.

Q. Did Mr. Eberle appear in court?

A. It was not a question of evidence in that case, it was a question of law.

Q. Did Mr. Eberle come down to the office to employ you in that case?

A. He was either at my office or house, I do not know which.

Q. Don't you remember that you asked him to let you bring the suit in his name?

A. Well that is possibly so. I know I had an interest in the matter.

Q. Did you have an interest in the 17th Street suit?

A. No sir.

Q. Who came with Mrs. Henrici to your office?

A. I could not say.

Q. How did you come to bring that suit for her?

A. About that Judge I have a very indefinite idea.

Q. How many suits have you brought besides these three suits to

stop them from paving with Trinidad Lake put on by the Parker-Washington?

A. I do not remember how many. there may be another one or two.

Q. Do you know who signed the injunction bond in that case?

A. I do not think there was any injunction bond, I do not remember any having been signed,—that is I have no independent recollection whether there was or not.

Q. Do you remember any connection Mr. Scarritt here had with those cases?

A. I cannot recollect he had anything to do with those cases. I remember it seems to me in one of the cases there that was before Judge Gates that Mr. Scarritt was present, but that is only an idea of mine, I do not remember that.

Q. Who did he appear there for?

A. Well I could not even say he appeared. I know if he did appear it must have been on this side of the question.

Q. Do you mean to tell this court that Mr. Scarritt was not consulted in all three of these cases before they were brought?

642 A. I do not remember that he was.

Q. Didn't he bring those three cases to you?

A. Well I think the only thing Mr. Scarritt had to do with it,—I started this myself on my own street, I wasn't going to permit them to lay this in front of my property if I could help it.

Q. How much property did you have on that street?

A. I had 33⅓ feet.

Q. You were going to get into a fight against a paving company on account of 33 feet fronting on Tracy avenue?

A. That is what I was going to do.

Q. And you do not know whether you brought a suit or not?

A. I do not know. I know I represented Mr. Eberle.

Q. Was it a different contract?

A. The contract ran north.

Q. The contract under which the paving was let by Mr. Eberle's property was not the same contract under which yours was let?

A. It was under different ordinances.

Q. Which was let first, the Eberle contract or the one in front of your house?

A. I do not remember.

Q. Don't you know the Eberle contract was let before the Parker-Washington bid for the paving in front of your property?

A. I do not recollect now Judge.

Q. You think you got into this fight on account of 33 feet you had on Tracy avenue?

A. I know it.

Q. Why do you know it?

A. Well the reason I know it is because I think it is so.

Q. What did you know about the Parker-Washington at that time?—they offered a good bond?

A. They claimed to offer a good one. The only thing I know

about it is they paved one or two streets in this city and made very poor streets and in addition they would not make repairs.

Q. Where was that you claimed that?

643 A. It was up on one of these streets, I do not know the name.

Q. Give the name of the street?

A. I could not do it now.

Q. The paving of a street which you do not know the name of is what made you make this fight against the Parker-Washington on Tracy avenue?

A. Why I was very familiar with what they did.

Q. Did Hugh McGowan introduce these people to you?

A. No sir.

Q. Or Col. Griffith?

A. No sir.

Q. Or Jim McGowan?

A. No sir.

Q. And you think all this came through your fight on 33 feet of ground?

A. If you will allow me to tell you not what I think but what I know,—lots of people on that street wanted different materials, some wanted brick and we had a fight with them on that and then they wanted to put down a cheaper grade of asphalt by the Parker-Washington and I naturally got heated up over that and Mr. Eberle was interested in it also, and I think at first I prepared a petition in my own name and I think afterwards I got Mr. Eberle to bring the suit in his name, and I didn't like the Parker-Washington anyway,——

Q. Who paid your fee for representing the plaintiffs in these various cases?

A. Well I decline to state in answer to that question what our arrangements with our clients were.

Q. Well who paid you your fee?

A. I decline to make any statements.

Q. I will ask you if somebody else besides these three persons you have named did not pay you your fee for your services?

A. I do not think so. I think, Judge, to start in it was a kind of voluntary matter in this case.

Q. Now Mr. Harkless I will ask you if you haven't received fees from the Barber Asphalt Paving Company for your services in this litigation?

A. In this particular litigation?

Q. One of these three cases?

644 A. I do not know of our receiving any in any of these cases.

Q. Have you ever received fees from the Barber Asphalt Company in any case?

A. I decline to answer that?

Q. Have you ever received any?

A. I decline to answer.

Q. Do you want to go before the United States circuit court with this matter in this shape?

A. I have no recollection of receiving a dollar from the Barber Asphalt Paving Company.

Q. Have you ever received any from Hugh McGowan?

A. No sir, I haven't an idea of receiving any from Hugh McGowan. We might have received money in other matters.

Q. Or Jim McGowan?

A. I haven't any recollection of receiving any money from anybody. My recollection is we got into these matters,——

Q. Well that is fog,—I want testimony of the fact as it is.

A. I have no recollection of ever having received a dollar fees in these matters, because, as I said, it was my fight in the first place.

Q. Was it paid through any other person?

A. I have no recollection of receiving any fees from anybody in the matter.

Q. Are you practicing law in that way in Kansas City?

A. I was then in that case.

Q. They had bid less than the Barber Asphalt Paving Company for the paving?

A. I think they had. I think they could afford to.

Q. You do not know anything about asphalt?

A. Well I don't know.

Q. Are you an expert?

A. Oh no.

Q. You decline to tell who paid you for your services?

A. I do not decline to tell because I do not recollect that we were ever paid a dollar.

Q. Who in your firm would know about it?

A. I think I would.

Q. Do you mean to say Mr. O'Grady or Mr. Crysler know anything about any fees paid?

645 A. I say it was largely a personal matter and I do not know of any fees paid.

Q. Have you ever got any compensation from Hugh McGowan in these matters?

A. No sir.

Q. Haven't you been engaged with the Scarritts in connection with trying to run the Parker-Washington out of town?

A. I think they were run out of town,—they ought to have been I think.

Q. They are engaged now in Kansas City, Kansas, under a truce with the Barber Company?

A. Yes sir.

Q. Have you told all you know about the institution of these suits?

A. I think so. If there is anything further I do not know it.

Q. If there was an injunction bond you do not know about it?

A. No sir.

Q. Do you remember of the Fidelity Company making a bond in the injunction suit?

A. I do not remember of it.

Cross-examination by Mr. SCARRITT:

Q. These suits as I understand you were disposed of on the pleadings?

A. Yes, and in the Eberle case and only in the Eberle case. It was all tried in that case.

Q. It was disposed of favorably to the plaintiff on preliminary motion?

A. Yes sir.

Redirect-examination by Mr. FIELD:

Q. Do you know who paid the costs in these cases?

A. As I told you Judge, I never looked and never paid enough attention to know.

By Mr. SCARRITT: I move to strike out the evidence of the witness, James H. Harkless, as being wholly incompetent, irrelevant and immaterial and ask that the cost of taking his testimony be charged against the complainant.

JAS. H. HARKLESS.

646 Sworn to before me on the day within the hours at the place in that behalf first aforesaid and subscribed in my presence this the 8th day of September, A. D. 1900.

ALFRED FIDLER,

[SEAL.] *Notary Public, Jackson County, Missouri.*

CHARLES T. GETTY, of lawful age, being produced, sworn and examined on the part of the complainant deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. Where do you live?

A. Kansas City, Missouri.

Q. How long have you lived here?

A. 23 years.

Q. How old are you?

A. 35.

Q. Did you ever work for Hugh McGowan or the Barber Asphalt Company, and if so for which of them?

A. I worked for Hugh McGowan about thirteen years.

Q. Beginning when?

A. In 1886, the latter part of 1886 and in 1887.

Q. Then you were deputy marshal?

A. Yes sir.

Q. You were deputy county marshal and when he went out of that office you went with him in the paving business?

A. Yes sir.

Q. What position did he occupy when you worked for him in the paving business?

A. He was agent for the Barber Asphalt Paving Company.
Q. Did he have anything to do with the construction of paving?
A. No sir, not in the least.
Q. Did he ever?
A. No sir.
Q. What did he do as agent of the Barber Asphalt Paving Company?
A. He got the work for the company to do.
Q. Do you mean he procured contracts?
A. He procured contracts.
647 Q. From the council and aldermen of the city?
A. No sir, after they got the contract then the councilmen and aldermen did their duty.
Q. What did he do in procuring contracts?
A. He had men employed to solicit signatures to petitions.
Q. Do you mean resident property owners?
A. Yes sir.
Q. Do you mean he would send out his petitions when he concluded a street ought to be paved, he would send out his petition to be signed by the property owners?
A. He did not always conclude that.
Q. State how it was.
A. When they thought a street could be paved the solicitors went out and got the names of the resident property owners. Non-residents did not count.
Q. Who took that?
A. Mr. Norris took some.
Q. Where did you take them?
A. To the city engineer's office and filed them with the chief clerk.
Q. Did Mr. McGowen take any?
A. I never knew him to take any.
Q. What was the next step?
A. To certify up to the council the majority or minority petition.
Q. Well suppose the majority of the residents signed the petition then what took place?
A. Then there was a resolution drawn up by the chief clerk of the engineer's office that was presented to the board of public works and certified by them to the council and the petition was also signed by the members present of the board of public works and the council.
Q. What did that petition say that was certified by the board of public works that was sent up to the council,—you mean the recommendation?
A. The petition that was signed by the property owners leading up to the city engineer's office to draw up the resolution. They had to have something to bank on to draw the resolution.
Q. And the petition was certified up to the board of public works. Where did the board of public works make their recommen-
648 dation?

A. They made it on the petition that the petition had the majority of resident property owners from point to point.

Q. And they recommended that a resolution be passed declaring the work necessary to be done?

A. Yes sir.

Q. And after that there was a publication?

A. It was published in the paper doing the city printing for eleven days.

Q. If there was no protest within ten days from the last publication then an ordinance was prepared?

A. The ordinance was prepared by the chief clerk of the engineer's office, presented to the board of public works and certified to by them and sent to the council.

Q. Then what?

A. Then it was at the disposition of the council to do whatever they wanted with it.

Q And the ordinance passed ordering the work?

A. Yes sir. The resolution was already passed by the same body.

Q. And if there was no protest the work was then advertised by the city engineer after the ordinance was passed?

A. After the ordinance was signed by the mayor then the work was advertised for bids by the engineer for ten days.

Q. Then which one of the offices, the office kept by Hugh McGowan or the construction office, looked after the proceedings up to that point?

A. Hugh McGowan's office,—I looked after them up to that time.

Q. When did you quit?

A. I quit when the contract was let.

Q. And you had nothing to do with the signing of the contract, Hugh McGowan did not sign the contract? When the contract was awarded to the Barber Asphalt Paving Company by the engineer then did you or Hugh McGowan sign the contract for the company?

A. No sir, the thing would be for me to get the contract out of the engineer's office and have the construction bond and maintenance bond made and have it signed by the city engineer,
649 city counsellor and comptroller.

Q. Then you and Hugh McGowan's office looked after the matter of procuring the work and the only thing the construction office had to do with the contracts was to sign them,—is that right? I did not quite understand you is the reason I ask.

A. They construction office had all to do with it after they came in possession of the contract.

Q. When did they come in possession of the contract?

A. After the ordinance was approved by both houses and signed by the mayor and they were notified by the superintendent of city construction that that street was ready to be paved.

Q. Now I understand you up to the time the contract was con-

firmed ready to be executed by the Barber Asphalt Company Hugh McGowan and his office looked after the getting the contract and the only thing the construction company or its superintendent would do would be to sign the contract?

A. He would sign the contract for the Barber Asphalt Paving Company as attorney in fact.

Q. What else would he do between the circulating of the petition up to the time of the signing of the ordinance?

A. Nothing in the least.

Q. Then Hugh McGowan would attend to the procuring of the contracts?

A. Yes sir.

Q. The only thing that was done outside of Hugh McGowan and his force before the contract became complete and confirmed ready to be executed was the mere signing of the name?

A. Up to that time.

Q. Now the other names that were signed were the surety?

A. Yes sir.

Q. And the city engineer on the part of the city?

A. Yes sir.

Q. And in all the work that was done in Kansas City and in Westport were they the methods that were employed to get the work?

A. Altogether, yes sir.

650 Q. Did you work any different in Westport?

A. No sir.

Q. The only difference you had was you did not have a board of public works there?

A. Yes sir.

Q. The city engineer was the proper officer?

A. Yes sir, he was the officer to execute the documents.

Q. That was a smaller town?

A. Yes sir.

Q. Now did you attend the council meetings at Westport?

A. Yes sir.

Q. Were you out there when some of these pavings in question were let?

A. I was out there several times.

Q. I am talking about Main street, Baltimore avenue and Wyandotte street,—some of the witnesses have said you were there,—I don't know about it.

A. I guess I was there, yes.

Q. What were you doing?

A. I was looking after contracts with the Barber Asphalt Paving Company.

Q. That had been procured?

A. They had not been procured up to that time.

Q. Up to the time the contract was procured you were watching the contract?

A. Certainly, it was my business to watch it to that time if it had not been turned over to the construction company.

Q. Who did you see out there to get these contracts?

A. I saw all the aldermen.

Q. Did you speak to them about it?

A. No sir.

Q. What did you see them for then?

A. Prior to the contract?

Q. Yes.

A. Well as I recollect there were only three members of the aldermen that were on the public improvement committee.

Q. Who were they?

A. I do not recollect their names.

Q. What were you doing?

A. Simply looking after the work of the Barber Asphalt Paving Company.

Q. Don't you know what was done?

A. The city engineer received the bids. I believe they
651 were opened at five o'clock. There was a set hour to open bids and the aldermen, whoever they were, now I believe there were three of them, in connection with the city engineer opened the bids, or he, rather, opened the bids in the presence of the aldermen and awarded the contracts.

Q. I mean what did you do, what did you say?

A. There is nothing to say. I did not say anything, everything is legal, law up to that time.

Q. Were you out there when the petitions were filed?

A. Yes sir.

Q. Who took them out there?

A. I think I took them out.

Q. To pave these three streets?

A. Yes sir.

Q. What did you do with them?

A. I filed them with Dr. Love.

Q. And the next step was to pass the resolution?

A. Yes sir.

Q. Were you there when they were passed?

A. I was there when they were passed, yes sir.

Q. Do you recollect of Mr. Scarritt or Mr. Griffith writing up those resolutions?

A. I do not know.

Q. You were out there the night the resolutions came up to pass declaring the paving necessary on those streets?

A. Yes sir.

Q. What were you doing those nights?

A. I was looking after the routine work of the Barber Asphalt Paving Company before the council.

Q. What was the routine work?

A. I merely sat back in a chair and looked wise and if anything came up I possibly could explain it.

Q. Did you ever speak with aldermen about public work?

A. Several times, yes sir.

Q. How did you get them to favor you? Was it by speaking out in open meeting?

A. There was no favoritism Judge because they had something to go on strictly legal and their duty was to pass them in compliance with the petitions. Here was a petition properly signed and certified to by the engineer, the legally authorized officer of the
652 city to do that, presented to the council with his signature and they could not go back on that.

Q. Was the petition read there?

A. They were all read three or four times I suppose before they got through with them.

Q. He would read the ordinance three or four times?

A. He would read the petition and what it was to be paved, with the names that were signed to it and the city engineer's recommendation at the bottom of it. The aldermen heard all that. Then he would read the resolution by its caption and then somebody would move that it be read a second and third time and if there was no objection it would be adopted.

Q. All done the same night the petition was filed?

A. The petition was filed several days before that time to give the engineer time to go over it.

Q. And the same evening the petition came up the first time it would be read three times by reading the title and it would go through the same evening it was filed?

A. Yes sir.

Q. Did you make any talk that evening these petitions were filed?

A. There was none necessary.

Q. How do you know there was none necessary?

A. From the fact that the city clerk read the resolutions and somebody moved they be adopted and they were adopted by a full vote of the house.

Q. You say that no talk was necessary?

A. What talk was necessary, what could I say?

Q. Well whatever talk you thought necessary.

A. Whatever talk was made was before the council and fifty or sixty old-timers were there and heard it.

Q. Did you ever talk to the councilmen outside of the meetings, or were you confined in your privileges to the open session?

A. I had no confinement at all, I could speak individually or in open session.

Q. Did you ever speak to the aldermen individually?

A. Yes sir.

653 Q. Who was present?

A. The alderman and myself.

Q. That was in the line of your employment, was it?

A. Certainly it was.

Q. You were expected to get contracts and visit these meetings

and the aldermen of Westport and these public officers in Kansas City?

A. Yes sir.

Q. From whom did you get your instructions to do that?

A. Well implied instructions, there were no direct instructions Mr. Hugh McGowan would do that or I would.

Q. Was that your own method or his method?

A. I used my own way sometimes and he used his sometimes.

Q. Did you ever keep any books down at Hugh McGowan's office?

A. No sir.

Q. Did you ever keep any books?

A. No sir.

Q. Do you know the men he employed?

A. Mr. Norris was in his employ and is now.

Q. Do you know for what he was employed?

A. He was employed as solicitor.

Q. To solicit resident owners?

A. Yes sir, we passed the non-resident owners.

Q. You did not come to see me about Westport, did you?

A. I did not.

Q. How much salary did you get while you were working for Hugh McGowan?

A. Well I do not think that enters into this.

Q. I will have to ask Judge Philips to have you answer that.

By Mr. SCARRITT: You may decline to answer that question.

A. I decline to answer.

By Mr. FIELD:

Q. I will ask you how much commission you got on the work that was obtained?

A. None.

Q. You got no commission?

A. No sir.

654 Q. Who paid you for your services, McGowan or the Barber Asphalt Paving Company?

A. Hugh J. McGowan.

Q. Are you a man of family?

A. No sir.

Q. Do you know whether he paid anybody a commission on any work obtained?

A. He did not.

Q. Paid you a salary, Norris a salary and Jim McGowan a salary?

A. Yes sir.

Q. Do you know how Hugh McGowan was paid, whether by salary or commission?

A. No sir.

Q. Did you ever hear him say?

A. No sir.
Q. Did you ever hear him say he was getting 25 cents a yard for all work obtained?
A. I have heard rumored.

Counsel for defendant moves to strike out the answer of the witness as hearsay and not competent evidence.

Q. Did you keep any books down there?
A. No sir.
Q. Do you know whether he visited the city offices and city engineer as you did?
A. I do not.
Q. Do you know whether he kept any books?
A. He did not have anything to put down I tell you.
Q. Have you seen aldermen visiting Hugh McGowan's office?
A. Visiting his office?
Q. Yes.
A. No sir.
Q. Didn't you ever see an alderman in Hugh McGowan's office?
A. I have seen them around in election times,—they were not aldermen then.
Q. What were they?
A. Trying to be aldermen.
Q. Why did they come to see him about that?
A. Just as if they would come to see you or anybody else, just wanted his good will.
Q. Westport aldermen along in 1896 and '7?
A. No, sir, I never saw a Westport alderman at his office in my life.
Q. Have you ever seen him talking to them?
655 A. I have seen him talking to them on the street.
Q. Mr. McGowan was a very influential man here in politics?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial.

A. I do not know as he was, I do not know as he was any more than any other man.
Q. Wasn't he known as a political boss?
A. No sir,—the newspapers might call him that.
Q. Wasn't he specially known as a political boss?
A. No sir.
Q. Well who had the influence before the city council?
A. Well I had some myself,—the property owners backed me up.
Q. You mean the petitions that you had there representing them?
A. That represented them.
Q. That you had got signed?
A. I never got a petition signed in my life.
Q. You do not mean that everybody that signed a petition was personally present?

A. Oh no,—we would have the whole town down there if they were.

Q. You would take the petitions that came from your office?

A. Yes sir.

Q. You would not come in contact with the property owners at all?

A. A great many times after I got a petition and have that turned into the city hall.

Q. Did you begin working for Hugh McGowan when he first went into promoting contracts for the Barber Asphalt Paving Company?

A. Yes sir.

Q. And you were with him consecutively for how long?

A. Up until 1898.

Q. And you were with him in 1886, were you?

A. Yes sir.

Q. He was marshal then, wasn't he?

A. Yes sir.

Q. Was he working for them when he was marshal?

A. No sir.

Q. When did he cease to be marshal?

A. In 1890.

Q. Then he went into business for the Barber Asphalt Paving Company?

A. No sir.

656 Q. Shortly afterwards?

A. Well nine months or a year afterwards.

Q. And you went in with him and started with this promotion of Barber Asphalt Paving Company contracts? Isn't that what you call it, the "promoter's office"?

A. The men under him did the promoting.

Q. Isn't that known as the promoter's office?

A. No sir, it is known as the agent's office, Hugh J. McGowan, agent of the Barber Asphalt Paving Company.

Q. Well I see his name in the directory as general agent?

A. I do not know what the directory says.

Q. What year did you say he began in this business?

A. He got out of the marshal's office in 1890 and it was in 1891 or 1892 he took hold of it.

Q. Did he begin this way of working among the property owners at the start?

A. What way?

Q. Working among property owners with a petition to sign.

A. Yes sir.

Q. Did you do that on the start?

A. Yes sir, I know one street, Main street, that was worked that way, and some of the old timers wanted to knock it out and put down the old macadam.

Q. Now I am talking about from Missouri avenue to Seventh

street the first piece of pavement that was laid by the Barber Asphalt Paving Company under Hugh J. McGowan, wasn't it?

A. No sir.

Q. What was the first piece?

A. West Ninth street.

Q. Do you remember the specifications as they read on West Ninth street?

A. Yes sir.

Q. Asphalt on concrete,—there were three pavements, three different materials for pavement, asphalt on concrete, cedar blocks and stone and brick, leaving the property owners to select which of the several materials they desired. Now in the specifications at that time for asphalt pavements how was it, Trinidad Lake or
657 just generally, "asphalt"?

Counsel for the defendant objects to the question as calling for secondary evidence. The specifications are on file and are the best evidence, and this matter is immaterial and irrelevant.

Q. What were the specifications of the petitions you circulated for Ninth street and Main street, were they for a particular brand of asphalt or general?

A. It is so far back I can't keep up with it.

Q. Well in the first petitions that you circulated for the Barber Asphalt Paving Company how did you specify the material?

(Counsel for defendant makes same objection as above.)

A. I could not answer of my own knowledge what they were Judge.

Q. Can you answer this question,—when was it you first began to specify in the petitions signed by resident property owners, "genuine Trinidad Lake asphalt"?

A. I could not tell you just what time it was there were so many of them circulated.

Q. There was no contractor bidding against you for street work for the first two or three years?

A. Yes, there were fellows came in here and make a straw bid and bob out again.

Q. They were not "bobbed" out?

A. No sir, I did not use that expression. I said they "bobbed" out themselves.

Q. There was a very determined effort that they should not have any work?

A. No sir.

Q. There was a very determined effort to keep them out?

A. No sir.

Q. You tried to do it?

A. No sir. We tried to keep them out when they came in and tried to get work we had procured and they had some "cock and bull" story, and then it was legitimate to keep them out.

Q. What was it they did?

A. In what respect?

Q. What do you consider that parties coming in here did that it was justified in keeping them out?

658 A. Bidding on things they could not supply.

Q. Who?

A. I could not give you the names.

Q. Is that the reason they tried to keep the Parker-Washington out?

A. No sir,—they ain't kept out, are they?

Q. Are they laying any pavements here?

A. The last I knew they were laying lots of asphalt in Wyandotte.

Q. Can you name any they laid here since 1897?

A. I know they laid Washington street here.

Q. After that there were some suits brought to stop them bidding on Tracy avenue and Park avenue and Seventeenth street?

A. I do not know anything about it.

Q. They put in a bid for Tracy avenue?

A. Yes sir.

Q. And the Barber Company brought suits and claimed they could not furnish the Trinidad Lake asphalt?

A. I did not know anything about it until they came into court.

Q. Did you ever hear Hugh McGowan say they could not furnish Trinidad Lake asphalt?

A. No sir.

Q. It was claimed they could not?

A. They claimed they could.

Q. And it was claimed they could not?

A. Yes sir.

Q. And there were suits brought alleging they could not?

A. I do not know who brought them or anything about them.

Q. Do you know whether all those petitions you circulated specified genuine Trinidad Lake asphalt, in 1896 and '7?

A. Yes sir.

Q. How many streets did they lay?

A. They laid only one that I know. Their plant is going all the time.

Q. It is going here in Kansas City, Missouri?

A. Yes sir.

Q. And yet they are not bidding for any work here and have not for three or four years?

A. I do not know. I am not interested in bidding any more.

Q. Don't you remember of Jim Jones running for mayor

659 here in 1896 or 1897 and making speeches and he said he was going to have competition here?

A. I have read in the papers speeches he made to that effect it was said.

Q. When did the Gilson people come in here, about four years ago?

A. I do not know just exactly when they did come in here.
Q. You had some prospect of competition for a short time after Jones was elected?
A. I do not know.
Q. You had a harder time getting contracts for a short time after he was elected?
A. No sir.
Q. Where is he now?
A. I do not know.
Q. He has left here?
A. Yes sir. The last I heard he got married and was at Indianapolis.
Q. Did you ever hear of him being Hugh McGowan's attorney at Indianapolis?
A. No sir.

Counsel for the defendant moves to strike out the question and answer as immaterial.

Q. Do you know anything about an effort being made to have open specifications in asphalt paving here in Kansas City?
A. No sir.
Q. Do you know anything about Graham's efforts and Wise's efforts to accomplish that?
A. No sir,—oh, well, I have seen it in the papers.
Q. You did not regard it of any consequence?
A. Well I will give you an instance of that. They have tried to pave here with asphalt on Oak street from 8th to 9th and there were three remonstrances filed there by the owners themselves.
Q. Hugh McGowan brought that himself?
A. No sir, I know he did not bring it because I was trying to get that street to pave myself.
Q. On an open specification?
A. No sir.
Q. You threatened to quit business here if they got to open specifications?
A. No sir.
660 Q. Don't you know that now?
A. No, I do not.
Q. I believe, Mr. Getty, I have got all I need out of you.

CHARLES T. GETTY.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this the 1st day of September, A. D. 1900.

ALFRED FIDLER,
[SEAL] *Notary Public, Jackson County, Missouri.*

Not being able to complete the taking of these depositions on this day on account of the absence of other witnesses whose testimony the complainant is desirous of taking, the hour of six o'clock having arrived, I adjourn the further taking of these depositions until to-

morrow, then to be resumed at the same place and within the same hours mentioned in the annexed notice and the caption hereof.

Given under my hand and notarial seal this third day of August, 1900.

ALFRED FIDLER,

[SEAL.] *Notary Public, Jackson County, Missouri.*

Pursuant to adjournment as above stated on this the fourth day of August, 1900, between the same hours mentioned in the caption hereof and at the same place, counsel for both parties complainant and defendant being in attendance, I resumed the taking of these depositions as follows:

WILLIAM C. HENRICI, of lawful age, being produced, sworn and examined on the part of the complainant deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. What is your name and residence?

A. William C. Henrici. 1013 Park avenue, Kansas City, Missouri.

Q. What position do you hold?

A. I am cashier of the Interstate National Bank of Kansas City, Kansas.

Q. At the stockyards?

A. Yes sir.

Q. How long have you lived in Kansas City, Missouri?

A. About twenty years.

Q. Do you remember in the year 1897 the matter of paving Park avenue in front of your residence?

A. Yes sir.

Q. Was your residence in your wife's name or in your name?

A. My wife's name.

Q. What is her name?

A. Jennie Henrici.

661 Q. Do you remember the question coming up about it being paved with Trinidad Lake asphalt?

A. That was the Barber Company. The original question was to pave it by the Parker-Washington.

Q. Do you remember the Parker-Washington bidding for that work?

A. Yes sir, if I remember the contract was let to them.

Q. Was awarded or about to be awarded?

A. Yes sir.

Q. Do you remember a suit being brought in the name of Jennie Henrici against Henry Wise and the board of aldermen to prevent that work being done by the Parker-Washington?

A. I do not know anything about the names of the parties, but there was a proceeding to prevent the Parker-Washington doing the work.

Q. Did your wife take an active part in that work, or did she only know through you what was going on in the case?

A. She knew through me what was going on in the case.

Q. I will show you a bond signed by the Fidelity and Deposit Company,—I will ask you if you signed that?

A. Yes sir, that was signed by me for her.

Q. Did you see the Fidelity and Deposit Company in regard to that bond?

A. No sir.

Q. I will ask you if you employed Mr. Harkless, or Harkless, O'Grady & Crysler, as attorneys to represent your wife in that suit?

A. I had no conversation with any of them about the suit.

Q. You made no arrangement or had no conversation with them about signing that bond?

A. No sir.

(Counsel for the defendant here reserves objection to each and every of the questions and answers of above witness and the right to file motion to strike out is reserved on account of relevancy, incompeteucy and immateriality of testimony.)

Q. Did you compensate Harkless, O'Grady & Crysler, or did your wife, for the services performed in that case?

A. No sir.

Q. How did you happen to bring that suit, Mr. Henrici, or
662 to authorize it to be brought?

A. Well it was the result of a conversation I had with Mr. Griffith an attorney from Mr. Scarritt's office.

Q. Mr. Griffit- of Scarritt, Griffith & Jones?

A. Yes sir.

Q. Well were you requested or not to allow the use of your name or your wife's name?

A. Well I do not remember the exact circumstances, but as I first mentioned there had been considerable delay in the paving of Washington street by the Parker-Washington people. It may have been that Mr. Griffith first suggested the idea of a suit,—I forget exactly how it was.

Q. But you said you had no conversation with Mr. Harkless or Harkless, O'Grady & Crysler on the subject of filing the suit?

A. No sir.

Q. And know nothing about securing the Fidelity and Deposit Company of Maryland as surety on the bond?

A. I think that bond was submitted to me for signature?

Q. By Mr. Griffith?

A. Yes sir.

Q. Your recollection is Mr. Griffith had you to sign?

A. Yes sir.

Q. That is all. This difference was about the paving of Park avenue in front of your residence?

A. Yes sir.

(Counsel for defendant moves to strike out the whole of Mr. Henrici's testimony for the reason that it is incompetent, irrelevant and immaterial to the issues in this case because the suit concerning which he has questioned is not upon the same tax bills as are at issue in the case at bar.)

WILLIAM C. HENRICI.

Sworn to before me on the day within the hours at the place in that behalf aforesaid and subscribed in my presence this the 15th day of September, A. D. 1900.

ALFRED FIDLER,
[SEAL.] *Notary Public, Jackson County, Missouri.*

Not being able to complete the taking of these depositions on this day by reason of the absence of other witnesses whose
663 testimony the complainant is desirous of taking, and the hour of six o'clock having arrived, I adjourn the further taking of these depositions until Monday, August 6th, 1900, (tomorrow being Sunday) the taking thereof then to be resumed at the same place and within the same hours mentioned in the caption hereof and in the annexed notice.

Given under my hand and notarial seal this the 4th day of August, 1900.

ALFRED FIDLER,
[SEAL.] *Notary Public, Jackson County, Missouri.*

Pursuant to adjournment as above stated on this the 6th day of August, 1900, between the same hours mentioned in the caption hereof, at the same place, counsel for all parties complainant and defendant being in attendance, I resumed the further taking of these depositions as follows:

GEORGE EBERLE, of lawful age, being produced, sworn and examined on the part of the complainant deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. Your name is George Eberle and you reside on the corner of Ninth street and Tracy avenue, Kansas City, Missouri?
A. Yes sir.
Q. You own that corner?
A. Yes sir.
Q. How long have you lived there?
A. I owned the corner 20 years,—we have lived there twelve years.
Q. Do you remember a suit that was filed in your name in the circuit court of Jackson county, Missouri, in October, 1897?
A. Yes sir.
Q. That suit, I believe, was to restrain the city officers from letg the work of paving Tracy avenue from Seventh to Ninth street

to the Parker-Washington, with Trinidad Lake asphalt,—that is what the ordinance called for?

A. Could they put down Trinidad Lake asphalt?

Q. Anyhow you brought a suit to restrain them from doing that work?

Counsel for the defendant objects to the question as calling for the conclusion of the witness.

A. Yes sir.

Q. Did you pay the costs in that case, Mr. Eberle?

A. We won the suit.

664 Q. You got an injunction, did you?

A. Yes sir.

Q. And a judgment for costs?

A. That is my understanding.

Q. Well suppose the record shows June 8th, 1898, received payment of plaintiff costs amount $60.95?

A. Who paid that costs?

Q. I say did you pay it?

A. I did not.

Q. You were the plaintiff in that case, were you not?

A. Didn't the Parker-Washington pay it?

Q. This record I read says "plaintiff," did you pay the costs?

A. I did not.

Q. Did you have any knowledge of who did pay them?

A. No sir.

Q. Mr. Harkless, I believe, was the attorney representing you in that case?

A. Yes sir.

Q. Who paid for his services?

A. He did not charge anything. Nobody paid him.

Q. Was that understood before the suit was instituted?

A. It was understood he was to make the fight.

Q. What was said about the costs?

A. There would be no costs.

Q. What about the court costs?

A. I never paid it.

Q. I mean what was said by Mr. Harkless.

A. Why he was protecting me.

Q. Take the witness. That is all Mr. Eberle.

By Mr. SCARRITT:

Q. That is all.

(The defendant objects to each and every question asked this witness on the ground that the same is immaterial and irrelevant and moves the court to strike out the testimony of the witness entirely on the ground it is incompetent, irrelevant and immaterial to the issues

on which testimony is now being taken under the order of the court and also under the issues raised by the pleadings in this case.)

GEO. EBERLE.

Sworn to before me on the day within the hours at the
665 place in that behalf aforesaid and subscribed in my presence this the 29th day of October, A. D. 1900.

ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

JOSEPH LORIE, of lawful age, being produced, sworn and examined on the part of the complainant deposeth and saith as follows:

Direct-examination by Mr. FIELD:

Q. How long have you been a resident of Kansas City, Missouri?
A. Going on 36 years.
Q. Do you remember a suit that was filed in your name in the circuit court of Jackson county, Missouri, at Kansas City in October, 1897, against the Parker-Washington Company and the city council, men, mayor and city engineer to restrain the city officers from awarding the contract to the Parker-Washington Company for paving Seventeenth street with Trinidad Lake asphalt?
A. Yes sir.
Q. Who paid the costs in that case?
A. I have not paid any costs in it.
Q. I say who did pay them?
A. I do not know sir.
Q. Well suppose the books of the clerk of the circuit court show January 8th, 1898, "Received payment of plaintiff costs, amount $54.15," I will ask you if you paid those costs?

Counsel for the defendant objects to the question as calling for the conclusion of the witness and as being based on a supposition, incompetent, irrelevant and immaterial.

A. No sir.
Q. You say you paid no costs in that case, Mr. Lorie?
A. No sir.
Q. Who paid your attorney's fee in that case?
A. I did not pay any.
Q. Sir?
A. I did not have any to pay.
Q. Do you know who represented you in that case?
A. Yes sir.
Q. That was on Seventeenth street I believe?
A. Yes sir.
666 Q. I see you gave an injunction bond in that case, Mr. Lorie? Did you sign that paper?
A. Yes sir, I signed that bond.
Q. That is the injunction bond in that case I asked about?

Counsel for defendant objects to the question as calling for the opinion of the witness and secondary evidence.

A. Yes sir.
Q. I will ask you what do you know about the Fidelity and Deposit Company of Maryland having signed that bond as your surety in that bond?
A. In what way?
Q. Having signed the bond as your surety, what do you know about their having signed it?
A. I think they are perfectly good.
Q. What do you know about their having signed it?
A. They signed it for me here.
Q. Did you say anything to them about signing that bond?
A. I could not tell you now.
Q. Did you pay them anything for signing that bond?
A. I do not remember whether I did or not, I guess they were paid.
Q. Did you pay them anything?
A. I do not remember now.
Q. You did not pay any lawyer's fee in that case?
A. No sir.
Q. You have not paid any?
A. No sir, I have not received any bill.
Q. Are you liable for any fee?
A. They have not sent me a bill.
Q. Are you liable for any, do you expect to pay any?
A. I just employed them and I have not received any bill.
Q. Did Mr. Scarritt employ them?
A. I do not know.
Q. How did you happen to hire Mr. Harkless?
A. He is a friend of mine and I hired him, I would not hire a shoemaker.
Q. You generally have Ringolsky, don't you?
A. I never had him in my life.
Q. Didn't you have him in a United States court case you had before Judge Philips?

Counsel for the defendant objects to the question as incom-
667 petent, irrelevant and immaterial.

Q. Did you ever have any talk with Mr. Harkless about this case?
A. I never made any contract with him.
Q. Did you ever make any contract with anybody about any fee in this case?
A. I never made any contract with him at all. He represented me. Judge I have had a great many suits and I never made a contract with anyone.
Q. What other cases has Mr. Harkless represented you in except this one?

Counsel for the defendant objects to the question as incompetent, irrelevant and immaterial and a cross-examination of his own witness.

A. None.

Q. You never employed him or any member of his firm in any case except this one?

A. Not that I remember.

Q. And you say you have had a great many lawsuits in Kansas City?

A. I have had some.

Q. Now this was three years ago you had this suit, nearly, wasn't it?

A. I do not remember.

Q. You are a perfectly responsible man, aren't you, Mr. Lorie?

A. I think I am.

Q. Never had any bill presented to you for a fee in that case?

Counsel for defendant makes same objection as above.

A. No, sir.

Q. Did you expect them to present you a bill for services in that case?

(Same objection.)

A. I could not answer that question whether he will present a bill or not.

Q. Do you expect him to?

A. I could not tell expectations.

Q. Haven't you been down to the city hall to assist the Barber Asphalt Company in getting contracts?

(Same objection as above.)

A. No sir.

668 Q. Haven't you been a sort of opponent against competition?

A. No sir, I have been always in favor of competition.

Q. That is the reason you tried to stop the work on 17th street?

Counsel for defendant makes same objection as above.

A. No sir.

Q. Has anybody else tried to bid on Trinidad Lake except the Barber Company?

A. I do not know anything about it.

Q. Haven't you received rebates from the Barber Company on tax bills for paving in front of your property?

A. No sir.

Q. What compensation have you received for the use of your name in the 17th Street case?

A. Nothing whatever.

Q. Neither money or rebate of tax bills?

Counsel for the defendant objects to the question as incompetent, irrelevant and immaterial and not proper cross-examination.

A. No sir.
Q. That is all.

JOSEPH LORIE.

Sworn to before me on the day within the hours at the place in that behalf first aforesaid and subscribed in my presence this the 10th day of September, A. D. 1900.

ALFRED FIDLER,
Notary Public, Jackson County, Missouri.

(It is agreed by and between counsel for the parties complainant and defendant to this action that the petitions in the Henrici and Lorie cases above herein referred to are substantially the same as that in the George Eberle case, and that said petitions be considered parts of this record without being copied at length therein the petition in the Eberle case being substantially a copy of the petitions in each of said cases.)

At this point it was agreed by and between the parties complainant and defendant to this action that the further taking of these depositions be proceeded with before John M. Orr, notary public, on August 7th, 1900, each notary to certify to the depositions taken by him.

UNITED STATES OF AMERICA,
State of Missouri, County of Jackson.

669 I, Alfred Fidler, a notary public within and for Jackson county, State of Missouri, do certify that in pursuance of the annexed notice, came before me at the law office of R. H. Field in the New York Life building, Kansas city, Jackson county, Missouri, James B. McGowan, James H. Harkless, Charles T. Getty, William C. Henrici, George Eberle and Joseph Lorie, who were by me severally sworn to testify the truth the whole truth and nothing but the truth touching their knowledge of the matter in controversy aforesaid; that they were examined and their examinations reduced to writing in shorthand by myself in the presence of the witnesses respectively, on the days, within the hours, at the place in that behalf first aforesaid; that thereafter said shorthand notes were by me transcribed on the typewriter as above set forth and said depositions were subscribed by said witnesses respectively in my presence at the times above certified to.

I certify that complainant and counsel for defendant were present at the taking of these depositions. I certify that I am not counsel, attorney or relative of either party or otherwise interested in the event of this cause.

I have retained the said depositions in my possession for the purpose of returning the same to the court for which said depositions were taken, and said depositions are now herewith returned.

Given under my hand and notarial seal this 30th day of August, A. D. 1900. My commission will expire November 14th, 1902.

ALFRED FIDLER,
[SEAL.] *Notary Public, Jackson County, Missouri.*

Notary and witness fees taked at end of all these depositions.

670 In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

RICHARD H. FIELD, Complainant,
vs.
THE BARBER ASPHALT PAVING COMPANY, Defendant. } Depositions.

Depositions of sundry witnesses produced, sworn, and examined before me, John M. Orr, a notary public within and for the county of Jackson, in the State of Missouri, by agreement of the parties, formal notice of the taking of same being waived, beginning on the 7th day of August, 1900, at the office of the complainant, Richard H. Field, in the New York Life building, in Kansas City, county and State aforesaid, in a certain cause now pending in the circuit court of the United States for the western division of the western district of Missouri, wherein Richard H. Field is complainant and The Barber Asphalt Paving Company is defendant, on the part of the complainant.

Appearances.

The complainant appeared in person.
W. C. Scarritt appeared for the defendant.

Before the commencement of the taking of the depositions hereinafter set forth, I do hereby certify that it was agreed by and between the parties to the above entitled action, in my presence, that the depositions so to be taken at the time and place above stated, and continued from day to day as hereinafter certified to, should be reduced to short hand writing by me and afterwards be transcribed and subscribed by each of said witnesses, and that when so transcribed, said depositions should have the same force and effect as if the same had been written down in long hand by me and subscribed by said witnesses immediately thereafter.

Witness my hand and official seal this 7th day of August 1900.

JOHN M. ORR,
[SEAL.] *Notary Public, Jackson County, Missouri.*

ARTHUR M. ALLEN of lawful age, being produced, sworn and examined on the part of the complainant, deposeth and saith,—

Direct examination by Mr. FIELD:

Q. State your name?

A. Arthur M. Allen, Junior.
Q. What position do you hold in this county, if any?
A. I am a deputy circuit clerk.
Q. You are, you say, a deputy circuit clerk of Jackson county, Missouri?
A. Yes sir.
Q. In the Kansas City office?
A. Yes sir. Here at Kansas City, Missouri
Q. How long have you been a deputy circuit clerk?
671 A. Well sir I have held that position ever since about December 1896, I think that was the time. At any rate it was close to that time.
Q. Have you the appearance docket of your office,—that is the appearance docket of the circuit clerk's office with you, showing the number of the suit, the costs and names of the parties to the suits?
A. I have two of them here, but I don't know which one you want.
Q. I will get you to turn to case # 30999?
A. Here it is.
Q. That is the case of Joseph Lorie *versus* The Parker Washington Paving Company, is it not?
A. Yes sir, Joseph Lorie against The Parker Washington Paving Company and others.
Q. What kind of a suit is that?
A. It is an injunction suit.
Q. Who appears to be the attorneys for the plaintiff, Joseph Lorie, there?
A. Harkless, O'Grady & Chrysler.
Q. What is the total amount of the costs in that case?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial.

A. The total amount of the costs was $57.15. We received outside of the docket fee paid in June 8th 1898, $54.15 to balance costs.
Q. What was the date of that?
A. June 8th 1898.
Q. Who did you receive that from?

Counsel for the defendant objects to the question on the ground that it is incompetent, irrelevant and immaterial.

A. From the plaintiff.
Q. Well that is you mean that the entry on your books shows you received it?
A. Yes sir.
Q. Well do you remember just who*m* you received it?
A. No sir, that would be a hard thing to remember. We have so much of that to do down there that it is hard for me to tell.

Q. Now turn over to the next case, being case # 31000 and read the style of that case?

Counsel for the defendant objects to the question on the
672 ground that it is incompetent, irrelevant and immaterial.

A. George Eberlee against The Parker Washington Company *et al.*

Q. When was that suit filed?

A. October 7th 1897.

Q. Now I will get you to read the entry there?

A. Which entry?

Q. This entry here regarding the payment of the costs? And the amount of the costs?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial.

A. June 8th 1898 received payment of plaintiff's costs amounting to $60.95. The total would be $63.95.

Q. Well were those costs paid that day?

A. Yes sir.

Q. In that amount?

A. Yes sir, $60.95 was paid June 8th 1898.

Q. Did you receive that money?

A. Yes sir.

A. And the other also in the other case?

A. Yes sir.

Q. It was all paid on the same day,—that is the costs in both cases were paid on the same day?

A. Yes sir.

Q. I see a pencil memorandum there opposite some figures "bill S. G. & J. by request?

A. Yes sir.

Q. Whose handwriting is that?

A. Well I don't know whose handwriting that is. That is probably,—well I don't know whether that is Harry Payne's or not. This I know is in his handwriting, and also these figures here I think are in Dave McClanahan's handwriting.

Q. The figures are?

A. Yes sir, I think they are Dave McClanahan's. That is this credit here and the sheriff's costs are marked up in Harry Payne's hand writing.

Q. And the "Bill S. G. & J. by request" whose hand is that in?

A. I don't know whose that is.

Q. That writing appears on this same page?

Counsel for the defendant objects on the ground that it calls for secondary evidence.

673 Q. Well read it to us? Read what it says there on that side,—that is in the Eberlee case?

Counsel for the defendant objects to the question on the ground that it is incompetent, irrelevant and immaterial.

A. "Bill S. G. & J. by request. 6-7-98."
Q. Well what does that mean there? The figures mean June 7th 1898 does it not?
A. Yes sir.
Q. Well what does "Bill S. G. & J." mean?
A. Well I don't know what that means there, but this entry here beside the $43.00, is that the bill should be sent to Scarritt, Griffith & Jones I take it.
Q. Now I will get you to take the appearance docket, and the costs entry in number——

By Mr. SCARRITT: "I want to ask a question about that, and if I do so now it will, I think save time."
By Mr. FIELD: "Very well. Go ahead and ask it."

By Mr. SCARRITT:

Q. That "S. G. & J." is opposite the sheriff's bill for $43.00 is it not?
A. Yes sir.
Q. Scarritt, Griffith & Jones were the attorneys for the sheriff at that time were they not?
A. Well I could not answer that question, for I don't know whether they were or not.
Q. That is all.

By Mr. FIELD:

Q. Do you know whether they were ever the attorneys for the sheriff?
A. I could not say.
Q. They are the attorneys for the Barber Asphalt Paving Company are they not?
A. I don't know, but I suppose they are. That is what I have heard.

By Mr. SCARRITT:

Q. Don't you know that that firm is retained as the attor-
674 neys of the sheriff of Jackson county, and has been for some time.
A. No sir I don't know that.
Q. You don't know that to be the fact?
A. I do not.

By Mr. FIELD:

Q. Mr. Scarritt has directed your attention to the $43.00 in there and the initials of their names under or opposite I should say, the sheriff's costs. Now I will ask you if the item of sheriff's costs is not the last item of costs in that bill?
A. Yes sir.

Q. It is just before the total?
A. Yes sir. It is just before the total.
Q. And the letters and words "S. G. & J. by request," are opposit this last item?
A. Yes sir.
Q. In the bill of costs in that case?
A. Yes sir.
Q. Is it the habit of your office to keep the sheriff's costs seperate from the other costs?
A. No sir. We have a regular system of books down there—what we call a journal and ledger I think. This here we check and transfer from our day book the different items like it is here. Clerk $17.95 and sheriff $43.00. These are entered item by item in the *the* day book at the time, and the next morning one of the clerks goes at work and enters them under their proper headings or places.
Q. Did you read the receipt in that George Eberlee case and the date of the payment?
A. I did yes sir. June 8th 1898 received from the plaintiff costs to the amount of $60.95.
Q. Now that $60.95 was made up of the two items,—$43.00 due the sheriff and $17.95 due the clerk of the circuit court?
A. Yes sir.
Q. And would say from your knowledge and the way the books of the circuit clerk's office are kept that the entry "Bill to S. G. & J. by request" were limited to the item of the sheriff's costs alone, or to the whole bill of costs?

Counsel for the defendant objects to the question on the
675 ground that it is incompetent, irrelevant and immaterial.

A. No sir, I would not say that. When we send out a bill for costs we *we* make a notation here of the people we send it to, and if we don't know the people why we just send it to the attorney of the party liable according to the record for the costs and ask them to attend to it.
Q. Well now an entry is made in the preceding case on that subject?
A. Yes sir. The bill to the plaintiff's attorneys. It says "P. attorneys," and that means plaintiff's attorneys,—6-7-98.
Q. Is that entry opposite the sheriff's costs also?
A. Yes sir.

By Mr. SCARRITT:

Q. That is referring to the Lorie case?
A. Yes, sir.

By Mr. FIELD:

Q. Does that appear also opposite the item of the sheriff's costs?
A. Yes sir. That says send bill to plaintiff's attorneys,—or that is what it means. It says "P.'s attorney."
Q. You generally write that opposite the last item in the costs?

A. Yes sir, sometimes we do, and sometimes down here. That is simply our own memoranda for our own information in sending out ost bills.

Q. So where you have "Bill S. G. & J. by request" in the Eberlee case, you have opposite the item of costs in the preceding case "Bill to plaintiff's attorney"?

A. Yes sir.

Q. Giving the date?

A. Yes sir.

Q. The same date is not in both?

A. Yes sir the same date.

Q. Now turn to the case of Jenny Henrici, being case #31764 in the circuit court of Jackson county, Missouri, and give the style of that cause

A. It is Jenny Henrici *versus* Henry A. Wise *et al.*, city engineer of Kansas City.

Q. Is the Parker Washington Company a party defendant in that suit?

A. Yes sir.

Q. Who were the attorneys in that case?

676 A. Harkless, O'Grady & Chrysler.

Q. The same attorneys as in the previous case?

A. Yes sir.

Q. Now when did you receive the costs in that case?

Counsel for the defendant objects to the question on the ground that it is incompetent, irrelevant and immaterial.

A. When we received it?

Q. Yes sir, when the costs were paid?

A. June 8th 1898 received payment of the plaintiff's costs amounting to $62.75.

Q. Now how much of that item of costs,—how much of the total amount of that item was sheriff's cost?

A. $45.00.

Q. Is there any thing written opposite that item of sheriff's costs?

A. Yes sir.

Q. What is it?

A. Bill to plaintiff's attorney, 6-7-98.

Q. Now is that the same date as the similar item in the previous case or cases referred to?

A. Yes sir.

Q. And it is opposite the sheriff's costs, the same as the others?

A. Yes sir.

Q. The only one that Scarritt, Griffith & Jones appear in connection with is the second one?

A. Yes sir. Well I would not say positively for I forget what the number that one is.

Q. Well is it the Eberlee case that the firm of Scarritt, Griffith & Jones appear in connection with or is it the Lorie case? Look and see?

A. It is the Eberlee case.

Q. Are these books that you have referred to and read from the attorney's docket of the circuit court of Jackson county, Missouri, at Kansas City?

A. Yes sir.

Q. And a record of the costs in each case is kept there, and who pays them?

A. Yes sir.

Q. Do you know or recollect who paid these costs?

A. No sir I don't.

Q. Whoever paid them, paid them in the name of the
677 plaintiffs in the cases?

A. Yes sir. We mark all costs up in the name of the plaintiff.

Q. Well can you be sure that the costs were paid in the name of the plaintiff or in the name of the defendant?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial.

A. In the name of the plaintiff.

Q. They were paid in the name of the plaintiff?

A. Yes sir.

Q. Then there was not any of the costs paid in the name of the defendant?

A. No sir. If they had been we would have put our $3.00 docket fee in unless they had waived it at the time.

Q. You would have collected it from the defendant?

A. Yes sir. We would unless, as I said, they had waived it.

Q. And so from the entries would you say that the costs were undoubtedly paid in the name of and on behalf of the plaintiffs in these cases to which your attention has been called?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, and calls for a conclusion of the witness.

A. Yes sir.

Q. Are you familiar with the manner of receiving costs in your office there in such cases?

A. I think I am for I have been receiving them off and on for 8 or 10 years.

Q. I will ask you now if the costs in these three cases were paid at the same time?

A. They were all paid on the same day.

Q. That is they were all paid on June 8th, 1898?

A. Yes sir,

Q. In all three cases?

A. Yes sir.

Q. That is all.

Cross-examination by Mr. SCARRITT:

Defendant moves to strike out all of the testimony of this witness as hearsay, incompetent, irrelevant and immaterial to the
678 issues on which testimony is now being taken under the order of the court, and also under the issues in this case. I have no cross-examination."

(Witness claims his fee $100, which is paid to him by plaintiff in presence of notary.)

A. M. ALLEN, JR.

Sworn to before me, on the day within the hours and at the place in that behalf first aforesaid, and subscribed in my presence this 30 day of October 1900.

JOHN M. ORR,

[SEAL.] *Notary Public, Jackson County, Missouri.*

It being impossible to complete the taking of depositions herein on this day, by agreement of the parties entered into in my presence I continue the further taking of depositions herein until Wednesday August 8th 1900 at the hour of 2 o'clock p. m.

JOHN M. ORR,

[SEAL.] *Notary Public, Jackson County, Missouri.*

Now on this day, being Wednesday August 8th 1900 at the hour of 2 o'clock p. m. came the parties hereto at the place aforesaid, pursuant to adjournment as above certified to, when the following proceedings were had.

E. H. Jones (of the firm of Scarritt, Griffith & Jones) appeared for the defendant.

HENRY A. WISE, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith,—

Direct examination by Mr. FIELD:

Q. State your name?

A. Henry A. Wise.

Q. State your age and residence?

A. My age is 52 years, and I reside at #1500, Broadway, Kansas City, Missouri.

Q. How long have you resided in Kansas City, Missouri?

A. Ever since I came here in 1875. It has been practically my home ever since, although during that time I have been absent from Kansas City three or four times in the pursuit of my business or profession; but I have considered this my home ever since that time.

Q. What is your profession or vocation?

A. Civil engineer.

679 Q. How long have you been a civil engineer?

A. 32 years.

Q. Were you ever the city engineer of Kansas City, Missouri, and if so, state when?

A. Yes sir.

Q. You were city engineer of Kansas City, Missouri?

A. Yes sir.

Q. When?

A. From the spring of 1896 to the spring of 1900.

Q. You came in then as city engineer of Kansas City, Missouri, with the J. M. Jones administration as mayor of Kansas City?

A. Yes sir.

Q. I mean when J. M. Jones was mayor.

A. Yes sir.

Q. You were appointed city engineer by the board of public works of Kansas City, Missouri, were you not?

A. Yes sir.

Q. I believe the duties of the city engineer are those of an administrative officer under the board of public works, or for the board of public works?

A. Yes sir.

Q. Do you know anything about the history of specifications in your office, or in the board of public works office for the pavement of streets in Kansas City Missouri, with asphalt; and if so state what you may know about it?

A. When I assumed the duties of city engineer of Kansas City, Missouri I found general printed specifications in the office for the laying of asphalt paved streets. The specifications as I found them were for the laying of, or construction of paved streets with Trinidad Lake asphalt or any other asphalt equally as good, not specifying any brands however, other than Trinidad Lake asphalt.

Q. Now speaking more particularly of the history of the office, before the time,—beginning with the time of asphalt pavements in Kansas City, Missouri, do you know what was originally specified?

By Mr. SCARRITT: "I object to that question for the reason that it does not call for the best evidence, and because it is immaterial to the issues in this case."

By Mr. FIELD:

Q. Wait a moment. What street was first paved with
680 asphalt here in Kansas City as you understand it?

A. I am not certain whether it was Wyandotte street between Sixth and Ninth streets, or Walrond avenue between Independence avenue and St. John.

Q. You think it was either of these streets?

A. Yes sir, but as I say I couldn't be positive.

Q. Well what about Main street,—north Main street,—do you remember when that was paved?

A. No, I don't remember about that.

Q. From Missouri avenue to 7th street I believe? Was that paved before Wyandotte?

A. No sir, that was subsequent to the paving of Wyandotte street.

Q. I will ask you this question Mr. Wise,—whether you remember whether or not in a general way, the asphalt street paving in this city specified at the start Trinidad Lake asphalt? I mean in the ordinances and contracts? I don't ask for any particular brand but speaking generally did it or did it not specify Trinidad Lake asphalt?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case.

A. The original contracts specified Trinidad Lake asphalt on concrete. Some of the original ones specified simply asphalt on concrete.

Q. When did the specifications specifying Trinidad Lake asphalt begin in the history of street paving in this city,—if you remember?

A. I don't remember the exact date, but it was back before I went into the office of the city engineer.

Q. I will ask you if the Barber Asphalt Paving Company had any competition in here, previous to your administration in the paying of streets with asphalt?

Counsel for the defendant objects to the question on the ground that it is immaterial to any of the issues involved, and calls for a conclusion of the witness.

681 A. Not that I know of with possibly one exception. I think that was the paving of McGee street.

Q. If I understand you correctly in these early pavements of streets with asphalt here in Kansas City, Missouri, Trinidad Lake asphalt was not specified?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, calls for a conclusion of the witness, and because it is leading.

A. My recollection is that the early specifications called simply for asphalt on concrete; and subsequently Trinidad Lake asphalt on concrete was called for.

Q. This Trinidad asphalt and Trinidad Lake asphalt comes from, or is supposed to come from the island of Trinidad does it not?

A. Yes sir.

Q. It is a British possession, is it not?

A. Yes sir off the coast of Venezuela.

Q. Is the asphalt that is used in the pavement of streets,—the Trinidad Lake asphalt,—is that a refined asphalt, or is it used just as it comes from the asphalt deposits?

A. It is refined asphalt.

Q. Where are these refineries for asphalt?

A. Mostly around New York city.

Q. Well is that true of other asphalts as well as Trinidad Lake asphalt? Do they comes also from refineries?

A. Some of the Californian asphalts are so pure that they do not

need refining, but as a rule the asphalts are refined. All crude asphalts are refined, unless its purity is such that it does not require refining.

Q. The natural substances such as earth and liquids and other foreign substances, which necessarily make it impure are removed?

A. Yes sir the organic and inorganic matter is taken out by the purifying process.

Q. Do you say that that is true of all the asphalts that you know anything of that are used for street pavements, excepting the
682 California asphalts?

A. Yes sir.

Q. Now, ——?

A. That is the case with all the artificial asphalts that are laid. There is rock asphalt that that does not apply to.

Q. Now where does asphalt abound with reference to the place of its deposit?

A. In tropical and semi-tropical countries like Venezuela, Cuba, Peru, Mexico, and southern California, and in the rock formations in France, Sicily, Kentucky, the Indian Territory and Utah, and various other places,—probably.

Q. Now the asphalts that you at first named, previous to the rock asphalts, are they pitch asphalts, or in that form? Trinidad Lake asphalt is a pitch asphalt is it not, or in that form?

A. Yes sir, and all the first I named are in that form.

Q. Do you know how these asphalts grade in scientific circles, as to purity?

A. Well I know that the Bermudez asphalt in its crude state is more pure than the Trinidad Lake asphalt, and some of the California asphalts are very pure. They are so pure that they have scarcely any organic or inorganic matter in solution.

Q. These are regarded as purer?

A. Yes sir.

Q. And therefore need less refinement in order to get them in shape or condition to pave streets with?

A. Yes sir.

Q. Now after these various asphalts are refined, I suppose by that refining process they are brought then into a state of purity?

A. Yes sir.

Q. Well when refined what is the difference, or is there any substantial difference between the asphalts that you have named?

A. No sir there is no substantial difference after having gone through the process of refining. They are practically all alike then.

Q. Now in specifying,—I will ask you this question;—was it a part of your duties, or your duty, to furnish specifications to the board of public works for asphalt pavements?

A. Yes sir.

Q. It was your duty as city engineer of Kansas City, Mis-

683 souri to do *do* the work of furnishing these specifications for the board of public works in reference to asphalt paving?

A. Yes sir.

Q. The specifications that are made up for the board of public works, or were so made up while you were city engineer, were made up in your office I suppose?

A. Yes sir.

Q. I notice that in the contracts in question in this case or these cases, the asphalt is to be from 12 to 15% of the entire material used on the street, and the balance is sand and petroleum and carbonate I believe?

A. Yes sir.

Q. Was that the usual specification for Trinidad Lake asphalt pavements here in Kansas City, Missouri?

A. Yes sir, that was the usual specification.

Q. Now have you visited other cities where they use these other asphalts in street pavements that you have mentioned?

A. I have.

Q. What difference do they make in refined asphalts in their specifications for street pavements,—that is between Trinidad Lake asphalt, and these other asphalts?

Counsel for the defendant objects to the question asked the witness on the ground that it is immaterial to any of the issues in this case, and calls for a conclusion of the witness, and does not call for the best evidence.

A. There is no substantial difference.

Q. Now in what other cities do you know of asphalts other than Trinidad Lake asphalts being used for street pavements, and successfully used.

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, not the best evidence and because it calls for a conclusion of the witness.

A. Well in New York city, Buffalo, Detroit, Cincinnati, Indianapolis, Minneapolis and Omaha.

Q. How long have they been in use and well known as
684 good asphalts for street pavements?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, to any of the issues in this case, because it does not call for the best evidence, and because it calls for a conclusion of witness.

A. From 5 to 8 years.

Q. I mean to your knowledge?

A. Well that is it,—from five to eight years.

Q. That is what you refer to,—to your knowledge?

A. Yes sir.

Q. You know that to be the fact from your own knowledge?

A. Yes sir.

Q. What was your business before you were city engineer of Kansas City Missouri? Before 1896 I mean?

A. A railroad engineer and mechanical engineer.

Q. You were you mean a civil engineer?

A. Yes sir, a civil engineer engaged in railroad and mechanical work.

Q. Something has been said in this case about the Parker-Washington Company as a competitor of the Barber Asphalt Paving Company in Kansas City, Missouri for street pavements. Now I will ask you what you know about their efforts to get business here, and about their success in getting business here in Kansas City, Missouri, during your administration as city engineer of Kansas City, Missouri?

A. In the fall of 1896 the Parker Washington Company bid upon several contracts, among which was Washington street from Ninth to Thirteenth street, and also Lawton place, which is a small court between Thirteenth and Fourteenth streets east of Washington street. They were the lowest bidders on these two streets and the contract was awarded to them for the paving of both streets.

Q. Now right in that connection I will ask you if they ever did any paving excepting on these two streets you have named,—Washington street and Lawton place?

A. No sir,—no asphalt streets.

685 Q. Was that under a specification for Trinidad Lake asphalt that these two streets were paved?

A. Yes sir.

Q. How much was that paving in miles,—I mean these two streets?

A. It was about a quarter of a mile I should judge.

Q. Three and a half blocks I believe?

A. Yes sir.

Q. Three blocks on Washington street, and a half a block in Lawton place?

A. Yes sir.

Q. Those were the only streets they paved?

A. Yes sir, with asphalt.

Q. Did they bid on any other streets,—did they bid for the paving of any other streets with Trinidad Lake asphalt?

A. Yes sir, they bid on a number of other streets.

Q. Was their bids on these other streets lower than the bid of the Barber Asphalt Paving Company's bid?

Counsel for the defendant objects to the question asked the witness on the ground that it does not call for the best evidence, and is incompetent, irrelevant and immaterial.

A. Yes sir.

Q. Their bid was lower than the bid of the Barber Asphalt Paving Company?

A. Yes sir.

Q. Did they get any contracts other than these two you have mentioned?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, and does not call for the best evidence.

A. They did no other work.

Q. Well did the city of Kansas City give them any contracts for any other work?

Counsel for the defendant objects to the question asked the witness on the ground that it does not call for the best evidence, and is incompetent, irrelevant and immaterial to any of the issues in this case.

686 A. The public improvements committee of the common council awarded the Parker-Washington Company three or four contracts I believe, which were not confirmed by the common council.

Q. Well under the rules and procedure in your office were these contracts subject to the approval of the common council?

A. Yes sir.

Q. Now you say these contracts were not confirmed by the common council?

A. No sir, they were not.

Q. Now were there other bids made by them that were not considered by the public improvements committee of the common council,—that is bids that were rejected by the public improvements committee and not submitted to the common council?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, and not calling for the best evidence.

A. Yes sir, there was.

Q. What was the reason they did not award these contracts to the Parker-Washington Company, and why were the contracts that were awarded not confirmed by the common council? If you know?

Counsel for the defendant objects to the question asked the witness for the reason that it is incompetent, irrelevant and immaterial to any of the issues in this case, and does not call for the best evidence, but calls for the opinion and conclusion of witness.

Q. Answer the question?

A. Well that the Parker-Washington Company was an irresponsible company, and they could not get Trinidad Lake asphalt to pave with.

Q. Who made that claim?

Counsel for the defendant objects to the question on the ground that it calls for hearsay evidence, is incompetent, irrelevant and immaterial to the issues in the case, and calls for an opinion and conclusion of the witness.

A. The claim was made by the members of the public improvements committee and by aldermen in the council, and also by Mr. Hugh McGowan representing the Barber Asphalt Paving Company here.

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Q. Well did or did not the attorneys for the Barber Asphalt Paving Company claim the same thing?

A. Yes, I have heard them claim the same thing.

Q. Do you know whether or not the Parker-Washington Company did any other kind of paving here in this city,—that is any paving other than asphalt paving?

A. Yes sir.

Q. What was it?

A. They paved a number of streets with brick.

Q. Was there ever any claim made when they bid on brick paving that they were irresponsible, or any refusal of the common council to confirm the award of contracts to them for brick paving on the ground that they were irresponsible?

Counsel for the defendant objects to the question asked the witness on the ground that it calls for a conclusion and opinion of the witness and because it is incompetent, irrelevant and immaterial to any of the issues in this case.

A. No sir.

Q. Was there ever any objection to their responsibility excepting when they bid on Trinidad Lake asphalt pavements?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it calls for hearsay testimony, and the opinion or conclusion of witness.

A. None that I ever heard of.

Q. Their responsibility was not questioned as I understand you, excepting when they made a bid for work that called for Trinidad Lake asphalt, or for that kind of a pavement?

Counsel for the defendant objects to the question asked the witness on the ground that it calls for an opinion and conclusion of the witness and because it is incompetent, irrelevant and immaterial to any of the issues in this case.

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A. Their responsibility was not questioned.

Q. At any other time?

A. No sir.

Q. Excepting when they bid on street pavements that involved the use of Trinidad Lake asphalt?

A. That is all. Not at any other time.

Q. Now you say that the Parker-Washington Company paved a number of streets with brick?

A. Yes sir.

Q. Did they ship a plant here for paving streets with asphalt?

A. Yes sir.

Q. After you came here as city engineer,—I should say after you came into office as city engineer?

A. Yes sir.

Q. Do they still have a plant here,—I mean the Parker-Washington people?

A. Yes sir.

Q. Is it the same one that they had in the beginning?

A. Yes sir.

Q. How long has it been since they bid for any work here in this city, to your knowledge, or during your term of office did they cease bidding That is for street paving with Trinidad Lake asphalt?

A. They ceased bidding on asphalt pavements here in this city at the close of 1897.

Q. Did they bid on brick pavements here after that?

A. Yes sir.

Q. And during and since that time, did they do any asphalt paving elsewhere that you know of?

A. Yes sir.

Q. Where?

A. During the summer of 1899 they constructed a number of asphalt paved streets in Kansas City, Kansas.

Q. Kansas City, Kansas is adjacent to Kansas City, Missouri, on the west is it not?

A. Yes sir.

Q. Did the Parker-Washington Company tender a good bond with these bids that they made here for paving streets with Trinidad Lake asphalt?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and im-
689 material, and because it does not call for the best evidence, and also because it calls for a conclusion and opinion of the witness.

A. The approval of the bonds was some thing I had nothing to do with, therefore I can't say. The approval of the bonds was in the hands of the city comptroller, and he approved the bonds offered by them.

Q. Now did the common council of Kansas City, Missouri, after it was claimed that the Parker-Washington Company was irresponsible, and could not furnish Trinidad Lake asphalt comply with its bid and contract proposed,—that is after that did the council of Kansas City, Missouri, appoint a committee to investigate the question as to whether or not the Parker-Washington Company could furnish Trinidad Lake asphalt or do you know any thing about that?

Counsel for the defendant objects to the question asked the witness on the ground that it is leading, and incompetent, irrelevant and immaterial to any of the issues in this case, and calls for a conclusion and opinion of the witness, and not for the best evidence.

A. Yes sir, a committee was appointed by the lower house of the common council.

Q. By the lower house of the common council of Kansas City Missouri, a committee was appointed?

A. Yes sir.

Q. For the purpose of investigating as to whether the Parker-Washington Company could furnish Trinidad Lake asphalt?

A. Yes sir.

Q. What year was that?

A. 1897.

Q. Was there an investigation made at that time as to whether they could furnish Trinidad Lake asphalt?

A. Yes sir.

Q. Do you know whether the Barber Asphalt Paving Company's representatives were there,—that is Mr. Scarritt,—W. C. Scarritt and Mr. Hugh McGowan at that investigation?

A. They were.

Q. Were they claiming that the Parker-Washington Company could not furnish Trinidad Lake asphalt?

690 Counsel for the defendant objects to the question on the ground that it is leading.

A. Yes, sir.

Q. State what their claim was?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it is leading and calls for hearsay evidence, and an opinion and conclusion of the witness.

A. The claim made by Mr. McGowan and his attorneys was that the Parker-Washington Company were not able to secure or procure Trinidad Lake asphalt, and that they did not use it when they paved Washington street and Lawton place.

Q. What was the final conclusion or report of the committee of the lower house appointed to investigate that matter,—if they came to any conclusion?

Counsel for the defendant objects to the question asked the witness on the ground that it calls for a conclusion and opinion of the witness, and not for the best evidence, and because it is incompetent, irrelevant and immaterial to any of the issues in this case.

A. The committee reported that the Parker-Washington people could not secure the Trinidad Lake asphalt,—that was the conclusion the council came to any way; and that Washington street and Lawton place were not paved with Trinidad Lake asphalt exclusively.

Q. Do you know of any effort being made in the board of public works of Kansas City, Missouri, and in Kansas City, Missouri, by certain gentlemen to have open specifications for asphalt street paving and thereby have competition in asphalt street paving? If so

state what efforts you know of that were made in that direction or looking to that end by members of the board of public works and members of the council?

Counsel for the defendant objects to the question on the
691 ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and does not call for the best evidence, but calls for an opinion of the witness.

A. Specifications were drawn up in the fall of 1896, and in the year 1897, by the city engineer, looking towards competition in asphalt pavements. The president of the board of public works,—Mr. George S. Graham,—was active in its support. That is he was active in his support of these so called "open specifications," and a number of the members of the common council were also active in their support of them,—notably Mr. P. S. Brown, Jr., Mr. J. P. Lynch, and Mr. Ed Jewell. In the year 1898 and 1899 endeavors were made to obtain competition in asphalt paving, by means of open specifications, and Mr. George S. Graham of the board of public works, Mr. H. M. Beardsley and Mr. P. S. Brown, Jr., were strong advocates of open specifications during those years.

Q. That is there was two periods,—two different periods,—in which there was an effort made to secure open specifications for street pavements in asphalt?

A. Yes sir.

Q. First in the fall of 1896?

A. Yes sir.

Q. And then these efforts were renewed in 1898?

A. Yes sir.

Q. Now particularly with reference to '96 and '97 I would like you to make answer to the questions? What was their position in the council with reference to these so called "open specifications"?

Counsel for the defendant objects to the question on the ground that it is indefinite, incompetent, irrelevant and immaterial to any of the issues in this case, and because it calls for an opinion and conclusion of the witness.

A. Well the majority of the council were opposed to open specifications, and also the majority of the board of public works were opposed to open specifications.

Q. Were there any contractors making opposition or any
692 opposition to open specifications in street pavements?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, to any of the issues in this case, and because it calls for a conclusion and opinion of the witness.

A. Yes sir.

Q. By whom,—from whom did this opposition come?

A. The Barber Asphalt Paving Company and its representatives

Q. Who were its representatives here in Kansas City, Missouri, that time in procuring contracts?

A. Mr. Hugh McGowan and James B. McGowan.

Q. Did they attend the meetings of the board of public works the meetings of the common council pretty regularly?

A. Yes sir.

Q. Were they there frequently?

A. Yes sir.

Q. At nearly every section of the council they would have some thing coming up would they not, in regard to street pavements?

A. Yes sir.

Q. What particular brand of asphalt did they insist should b specified as the asphalt with which to do street paving?

A. Generally Trinidad Lake asphalt. They were of course con tending for Trinidad Lake asphalt.

Q. In the resolutions?

A. Yes sir.

Q. They would talk that?

A. Yes sir.

Q. Now would they make their talks or speeches out in open sessions of the council, or would they halt the aldermen, and the members of the board of public works in the lobbies or hall ways, or out on the side, before they went into session?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, and calls for an opinion and conclusion of the witness.

A. I never heard them make their objections in open sessions of the council.

693 Q. Q. These talks that you speak of were informal and made—I mean these talks for procuring contracts were made before the sessions of the council or the board of public works commenced?

A. They were made before the open sessions of the board of public works, but not before or at the sessions of the council.

Q. They would speak to the aldermen before the council would get in session?

A. Yes sir. I presume so.

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, and because the answer is a conclusion of the witness, and moves the court to strike the answer out for that reason.

Q. You were a regular attendant of the board of public works?

A. Yes sir.

Q. You were an attendant of the board of public works before you were an officer of that body and therefore regularly attended the sessions of that body?

A. I was required to attend the meetings of the board of public

works and also required by law to attend every meeting of the common council.

Q. You were required, or it was your duty to attend the meetings of both bodies?

A. Yes sir.

Q. Now you say that you never heard Mr. McGowan speak out openly before the council?

A. No sir.

Q. Before either house of the council?

A. No, sir.

Q. But he attended their sessions I understood you to say?

A. Yes, either he or his representatives.

Q. I will ask you whether or not you regarded Mr. McGowan as being a man of great or small influence in the city council of Kansas City, Missouri, in the years I have asked you about?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, and because it calls for a conclusion of the witness, and also for the reason that it is immaterial to the issues in this case, and is improper testimony.

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A. Yes sir, I have always regarded him as such.

Q. Sir?

A. I have always regarded him as such.

Q. How is that,—you say you have always regarded him as such. Do you mean to say that you have regarded him as a man of great or small influence?

A. I have always regarded him as a man of influence.

Q. I will ask you whether or not there was any man in Kansas City that was supposed to have, or was thought to have more influence in getting ordinances or resolutions,—either or both,—through the city council of Kansas City, Missouri than Hugh J. McGowan in the years I have mentioned?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that it calls for the mere opinion and conclusion of the witness.

A. Not that I know of.

Q. I will ask you if you have any reason to advance as to why open specifications for asphalt pavements in Kansas City, Missouri were not adopted, other than his influence against that proposition?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that it calls for a conclusion of the witness, and because it does not call for any fact, but the mere opinion of the witness.

A. I have always thought that his position against it was the principal reason why open specifications were not adopted, or obtained.

Counsel for the defendant moves the court to strike out the answer of the witness for the reason that the question does not
695 call for the thoughts of the witness, but for his knowledge based on the facts."

Q. What did you ever hear him,—Mr. McGowan,—or his attorney, and the attorney of this defendant, Mr. William C. Scarritt,—say about the Barber Asphalt Paving Company doing business here if open specifications were adopted,—or rather if open specifications for asphalt street paving were put in vogue or adopted?

Counsel for the defendant objects to the question asked the witness on the ground that it is immaterial to any of the issues in this case, and for the reason that it calls for hearsay testimony.

A. I have heard Mr. McGowan say that his company would not bid on the paving of Broadway from 16th to 22nd streets under the open specifications admitted or permitted on that one street, for the reason that he did not think the tax bills would be good, and for that reason the company would not bid on that street.

Q. Was that the only reason he gave?

A. I have also heard Mr. McGowan say that the introduction of open specifications would prevent much paving in this city.

Q. What particular objection was there to tax bills, or what particular thing was there that rendered a tax bill void, or the tax bills void by having open specifications?

Counsel for the defendant objects to the question asked the witness on the ground that it calls for a conclusion of the witness on a question of law.

A. None that I know of.

Q. I will ask you to state as a civil engineer and as a man having had experience as city engineer if there is any difficulty in framing specifications so as to make them open and admit of competition in the various asphalts?

Counsel for the defendant objects to the question asked the witness on the ground that it is immaterial to any of the issues
696 in this case, and for the reason that it calls for the opinion of the witness on a question of law.

A. There is none.

Q. There is no engineering difficulty in the way?

A. No sir. It is done in other cities. There is no engineering difficulty in the way at all.

Q. I believe you can take the witness.

By Mr. JONES: I don't care to cross-examine, but I have an objection or motion to make. Counsel for the defendant moves to strike out the testimony of this witness for the reason that it is irrelevant and immaterial to any issues in this case, and because it calls for hearsay testimony, and mere conclusions of the witness. That is all.

(Witness claims his fee for attendance as a witness,—$1.00.)

HENRY A. WISE.

Sworn to before me on the day, within the hours, and at the place in that behalf first aforesaid, and subscribed in my presence this 27 day of October 1900.

[SEAL.]

JOHN M. ORR,
Notary Public, Jackson County, Missouri.

GEORGE S. GRAHAM, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith:

Direct examination by Mr. FIELD:

Q. Please state your name, age and residence?

A. My name is George S. Graham. My age is about 53 years, residence #1851 Benton boulevard, Kansas City, Missouri.

Q. Were you elected to any office in Kansas City, Missouri, in April 1896?

A. Yes sir.

Q. To what office were you elected, and how long did you hold that office?

A. President of the upper house, and I held it for four years.

Q. For four years from April 1896?

A. Yes sir from April '96 to April 1900.

697 Q. The upper house of the common council you mean?

A. Yes sir.

Q. You were elected president of that body in April 1896 and held the office until April of this year,—1900?

A. Yes sir.

Q. The common council consists of two bodies,—the upper house and the lower house does it not?

A. Yes sir.

Q. And that is the legislative body of Kansas City?

A. Yes sir.

Q. Now you were not only the presiding officer of the upper house of the council, but you were as well, *ex officio*, presiding officer of the board of public works, which is another and seperate body?

A. Yes sir.

Q. Now the board of public works was a kind of an administrative body I believe?

A. Yes sir.

Q. I believe besides having some power for recommendations and resolutions to the council, as to materials for street pavements, and the improvements of streets, it executed the ordinances of the common council?

A. Yes sir.

Q. That is the ordinances were executed under its supervision?

A. Yes sir.

Q. Mr. Wise, the city engineer at that time, from '96 to 1900, was appointed I believe by your body,—that is he was appointed by the board of public works of which you were the president?

A. Yes sir.

Q. Do you remember in the fall of 1896, or the summer of '96, of an effort being made to have open specifications for asphalt street paving?

A. I don't remember just the dates, but at two different times I think there was an effort made in that direction.

Q. Well did it succeed or fail

A. It failed.

Q. It did not succeed?

A. No sir, the effort was not successful.

Q. You understand what I mean by "open specifications" do you not?

A. Yes sir, I think I do.

Q. That is specifications that would admit of competition in street paving?

A. Yes sir, not specifying any particular brand of asphalt is what is meant.

698 Q. They were designed to avoid specifying any particular brand of asphalt to be used in paving any particular street?

A. Yes sir.

Q. Do you know, or are you acquainted with Mr. Hugh J. McGowan?

A. Yes sir.

Q. And Mr. W. C. Scarritt?

A. Yes sir.

Q. Mr. W. C. Scarritt is the attorney for the Barber Asphalt Paving Company is he not?

A. Yes sir.

Q. I will ask you whether or not they were frequent attendants at the meetings of the board of public works during your term of office?

A. Well they were there at different times, but Mr. Hugh J. McGowan has not been in attendance lately. He was not there very often during the last two years I will say of my term of office.

Q. Well say during the years 1896 and 1897 was he a frequent attendant at the meetings of the board of public works?

A. Well, he was there several times, but I could not say how frequently.

Q. But you do know that he was there frequently?

A. Yes sir he was there pretty often.

Q. That is Mr. Hugh J. McGowan was?

A. Yes sir. I don't know though that you can say his presence there was frequent. He was there occasionally.

Q. Was he also an attendant on the meetings of the common council?

A. Well I think he was there also occasionally. I have seen him there.

Q. Well did he have any lieutenants there?

A. Yes sir, there were parties there that I presume and understood were representatives of the Barber Asphalt Paving Company.

Q. Mr. Charles Getty and Mr. James B. McGowan, do you know them?

A. Yes sir.

Q. Did they also attend the meetings of the common council?

A. Yes sir I have seen them there.

Q. They sat there in the lobby of the council chambers did they not?

699 A. Yes sir I have seen them there, and also in the halls leading to the council chambers, and the halls of the city hall generally.

Q. Now I will ask you what was the attitude of the representatives of the Barber Asphalt Paving Company, and its agents, and these parties I have named on these open specifications I have mentioned, with reference to whether they were favorable or unfavorable to open specifications

Counsel for the defendant objects to the question on the ground that it calls merely for the opinion or conclusion of the witness, and does not call for the best evidence, and because it is immaterial under the issues in this case on which evidence is being heard at the present time, and it is not relevant to any issue."

A. Well from the indications that I observed I think they were unfavorable to it.

Q. Well what did you see them do that would lead you to make that statement?

Counsel for the defendant objects to the question asked the witness on the ground that it calls for hearsay evidence and not for the facts and for the reason that it is incompetent, irrelevant and immaterial to any of the issues in this case."

Q. Well I don't know as I remember so much what they said particularly as to their general attitude. I have no question in my mind but what they were opposed to open specifications, but just what they said particularly I don't remember.

Q. I will ask you Mr. Graham how you regarded Hugh McGowan's influence with the common council during the years 1896 and 1897 while he was here? Was it great or small?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and also because it calls for a mere conclusion of the witness."

700 Q. Of course that is a mere matter of opinion.

A. That is all that it can be Mr. Graham? What did you regard his influence with the members of the common council at the time stated,—was it great or small?

Counsel for the defendant objects to the question anso on the ground that it is not a proper matter for expert opinion."

Q. It is not expert,—there is no expert about it?

By Mr. JONES: "Well I am making my objection, and I want it in the record."

By Mr. FIELD: "Certainly, and it is in the record."

By Mr. JONES: "I may be wrong about it, but I am simply making my objection."

Q. Now you may answer the question subject to my objection. Answer the question -r. Graham, for the court will pass on the objection."

A. Well it is my opinion that he had some influence with the council.

By Mr. FIELD:

Q. Do you know any body that ever was in Kansas City,—or at least was in Kansas City at the time mentioned that you thought had more influence with the majority of the common council than he had?

Counsel for the defendant objects to the question asked the witness on the ground that it is not the proper subject of expert opinion, and even if so this witness has not qualified to answer as an expert, and for the reason that it calls for a mere conclusion of the witness, and is incompetent, irrelevant and immaterial to any of the issues in this case."

A. Well he seemed to have considerable influence with the members of the common council.

Q. Well I will ask you if he was not a great factor, if not the factor, in preventing the success of the adoption of open specifications in asphalt street paving?

A. Well I don't know that I can answer that question.

701 Q. Have you seen him in conversation with members of the council when it was in session on evening- when street paving questions would be up?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case.

A. I presume I have, but I don't recall any particular one he was talking with.

Q. I did not ask you to name any particular one he was talking with. I simply asked you Mr. Graham if you have seen him in the halls or corridors of the city hall or in the lobbies of the council chambers, seen him in conversation with members of the council on evenings when street paving questions would be up for consideration?

A. Oh yes I have seen him doing that. He was a good mixer.

Q. Well did he mix with them before the sessions of the council began, or were his actions in the open council?

A. I don't think that I ever saw him do anything or say anything in the open council that I can recall. As I said awhile ago I haven't seen Hugh McGowan around the council chamber or the city hall much for a year or more. Before the time that he went away to Indianapolis, or wherever he is now located, I saw him around there occasionally.

Q. Well you mean since he went to Indianapolis, you haven't seen him around there?

A. Well yes, and for some little time before that.

Q. I will ask you whether or not he was generally regarded as a man potential in his influence with the common council in the years 1896 and 1897, and up to the time he left here?

Counsel for the defendant objects to the question asked the witness on the ground that it calls for a mere opinion and conclusion of the witness, and because it is incompetent, irrelevant and immaterial to any of the issues in this case.

702 A. I don't know Judge as I can add any thing to what I have already said about that. I know that he was regarded as an influential man,—a man of influence who brought things to pass.

Q. "Brought things to pass" in Kansas City here, you mean?

A. Yes sir, he generally got what he went after.

Q. And in the board of public works too, he brought things to pass?"

A. Well I don't know so much about the board of public works, but there is no doubt but that he was a man of influence, and a man of great executive ability. He was very active and was so regarded generally, and is yet for that matter.

Q. Was he an active man in politics here in Kansas City, Missouri?

A. Well he used to be I think,—at any rate I so understand it.

Q. He was a kind of a shaper of things and events in politics?

A. Well I don't know that I am prepared to answer that in that way. I am so little in politics myself that I could hardly say.

Q. You have a different kind of politics from the brand that Mr. McGowan has I believe?

A. Yes sir I believe so.

Q. Mr. McGowan's talk and actions in the board of public works and the council, was not very much with you I believe?

A. No sir he did not have very much to say to me. Now I don't want you to understand me as saying that he talked in the council. I don't want that inference left.

Q. Well you have seen him talking with members of the council, outside of the council chambers?

A. Yes sir. Occasionally I have.

Q. Well outside of the council did he talk with you very much?

A. No sir.

Q. Or did he mix with you very much?

A. No sir I can't say that he did.

Q. His mixing was with other councilmen who were for his propositions generally?

A. Yes sir, I think that Mr. McGowan was there looking after the interests of his company.

Q. And that company was the Barber Asphalt Paving Company?

A. Yes sir.

703 Q. Now were his methods down there with the council, were they secret, or were they out in the open so that every body heard what he said and saw what he did?

A. Well I don't know as I can answer that. I don't know any thing that was done in secret. Anything that I saw would probably be in the lobby or hall or vestibule down there.

Q. Well what do you say about that?

A. Well I never saw any thing I say, excepting that he was there occasionally mixing with people for he is a sociable kind of a fellow.

Q. Well you have seen him talking off on the side with members of the council?

A. I believe I have.

Q. Well would he stop a member of the council and take him off and have a whispered conversation with him?

A. Well now I don't know that I can answer that about a "whispered conversation."

Q. Do you know whether or not he was a man that contributed to the committees of both political parties during a political campaign?

A. Well I can't say Judge personally as to that. Personally I don't know about that.

Q. Do you know or remember of a check coming from him to the Republican committee, and its being returned to him?

A. No sir.

Q. Sir?

A. No sir. I don't know any thing about that. I never was on the central committee.

Q. Sir?

A. I said I did not know any thing about that, for I never was on the central committee.

Q. But you were a candidate once?

A. Yes sir, twice.

Q. And you never heard of that?

A. No sir. I don't know any thing about that whatever.

Q. What reason did you ever hear urged by any councilman or by Mr. Hugh J. McGowan as to why we should not have open specifications in connection with asphalt street pavements?

Counsel for the defendant objects to the question asked the
704 witness on the ground that it is incompetent, irrelevant and immaterial to any issue in this case, and for the reason that

it calls for hearsay evidence, and calls for a conclusion and opinion of the witness.

By Mr. FIELD: "Well never mind that. Let it go, for I don't care anything about it. That is all.

Cross-examination by Mr. JONES:

Q. Mr. Graham are any persons known to take part in the deliberations of the city council on any occasions, in the way of making speeches, and so on, unless specially invited?

A. No sir.

Q. That is not allowed by the rules?

A. No sir.

Q. Whatever objection or objections the representative or representatives of any person or corporation had to open specifications, they were given an opportunity to be heard and express themselves before the board of public works, were they not, at various times?

A. Yes sir.

Q. And they expressed themselves openly?

A. Yes sir. As far as I know they did. I don't know of any one who wanted to be heard there, who was not given an opportunity to be heard.

Q. The objections that were urged to open specifications, were largely legal in their character, were they not?

A. Well they were technical I thought, and insufficient as it appeared to me.

Q. Well I mean they were questions of law that were raised and urged against that,—I don't mean to ask you whether they were good and tenable or not,—I simply ask if they were raised?

A. Well no, I don't remember so much that they were legal questions. One point that was raised that I now recollect, or that I think of, was that it would cut off the right to petition. The other members of the board of public works argued that the property owners ought to have the right to petition, and also they urged that if this promotion business was cut off it would stop pavements and improvements on streets, or of a large number of streets, that otherwise would be paved and improved.

Q. There was some question was there not as to whether
705 the tax bills would be valid?

A. Well perhaps that question was raised. Perhaps that was a point that was raised.

Q. That is all.

Re-direct examination by Mr. FIELD:

Q. Well what reason did they raise or urge as to why the tax bills would be void? What was the difficulty in that connection with open specifications?

A. Well I did not think there was any difficulty about it, and the city counsellor did not seem to think there would be any difficulty about it. He agreed with me that there would be no difficulty about that, but I don't now recall what it was they did raise. They

objected to open specifications, but I don't just recall what all their objections were.

Q. Did the city counsellor give your board,—that is the board of public works,—an opinion to the effect that you had a right to adopt open specifications?

Counsel for the defendant objects to the question asked the witness on the ground that it calls for hearsay testimony, and does not call for the best evidence.

Q. Well I am asking him for what he told them? It was where this question was raised as to the legality of the tax bills issued under the open specifications programme for asphalt street paving, and you asked whether or not the city counsellor could or would give an opinion on that, and he did render an opinion, and his opinion at that time was,——

By Mr. JONES: "Well never mind what his opinion was. The opinion would be the best evidence of its contents."

A. My recollection is that the city counsellor was present both times when this matter was up before the board. I don't remember of but two times when it was up for consideration before the board, and specially considered. It might possibly have been referred to more than twice, but I think it was up on two occasions when it was specially considered, and I think the city counsellor was
706 present on both these occasions, and he was of the opinion that there was no legal difficulties in the way of open specifications that would invalidate the tax bills issued for work,—asphalt paving,—done under open specifications. I think that he gave a written opinion to the board to that effect, but I am not quite sure as to that.

Q. You are not quite sure as to the written opinion?

A. No sir, I think there was a written opinion given by the city counsellor on that question at the request of the board, but I am not quite sure about it.

Q. But you do remember the verbal opinion?

A. Yes sir.

Q. Well now then notwithstanding the opinion of the city counsellor, I understand you to say that there were three members of the board of public works,—that is all of the members of the board of public works outside of yourself voted against open specifications for asphalt street paving?

A. I believe they did. At any rate open specifications were beaten.

Q. And the council failed to provide open specifications thereafter?

A. They were never provided.

Q. That is all.

Counsel for the defendant moves the court to strike out all the questions and answers asked to and given by this witness on the

ground that the questions do not call for and the answers do not give the best evidence, and because it is incompetent, irrelevant and immaterial to any of the issues in this case."

GEO. S. GRAHAM.

Sworn to before me, on the day, within the hours, and at the place in that behalf first aforesaid, and subscribed in my presence this 26 day of October 1900.

JOHN M. ORR.

[SEAL.] *Notary Public, Jackson County, Missouri.*

707 It being impossible to complete the taking of depositions herein on this day owing to the hour of six o'clock having arrived, by agreement of the parties entered into in my presence, I continue the further taking of depositions herein until Monday, August 13th 1900 at the hour of 2 o'clock p. m., then to be resumed and continued at the place in that behalf aforesaid.

JOHN M. ORR,

[SEAL.] *Notary Public, Jackson County, Missouri.*

Now on this day, being Monday, August 13th 1900, pursuant to adjournment as above noted, I resumed the taking of depositions herein as follows:

R. B. MIDDLEBROOK, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith,—

Direct examination by Mr. FIELD:

Q. State your name?
A. R. B. Middlebrook.
Q. Where do you reside Mr. Middlebrook?
A. In Kansas City, Jackson county, Missouri.
Q. How long have you resided in Kansas City, Missouri?
A. Twenty two years.
Q. What official position, if any, do you now hold in Kansas City, Missouri?
A. City counsellor.
Q. City counsellor of Kansas City, Missouri?
A. Yes sir.
Q. Since when?
A. April 27th 1897.
Q. As city counsellor of Kansas City, Missouri, is it a part of your duties to advise the various officers of this city on questions of law?
A. Yes sir it is.
Q. Do you remember a question coming up before the board of public works of Kansas City, Missouri, soon after you went into the office of city counsellor of Kansas City, Missouri in April 1897 on the question or subject of the legality of specifications authorizing competition in asphalt street pavements?
A. Yes sir.

Q. I will ask you whether or not you were asked for your advice by the board of public works as to the legality of open specifications, or specifications that allowed competition in asphalt street pavements?

A. I was.

708 Q. You were asked for your advice on that question by the board of public works?

A. Yes sir.

Q. I will ask you whether or not you advised them that there was any obstacle or impediment in the way of open specifications? or specifications known as "open specifications" which permitted of competition in asphalt street pavements?

Counsel for the defendant objects to the question asked the witness on the ground that it is immaterial and irrelevant under any of the issues in this case, and because it calls for a mere opinion or conclusion of the witness, and because it seeks to bring out a conversation between this witness and other parties or persons, not parties to this litigation."

A. I advised them that in my opinion it was legal to formulate other plans and specifications in such a way as to permit of competition in asphalt street paving for streets.

Q. I will get you to state whether they followed, or ignored your advice on the subject?

Counsel for the defendant objects to the question asked the witness on the ground that it is immaterial and irrelevant to any of the issues in this case, and because it does not call for the best evidence.

A. They did not follow my advice.

Q. I will ask you how many members there were in the board of public works?

A. Four.

Q. Were they unanimous in declining to follow your advice as to the legality of open specifications, or was there a division in the board on that question of open specifications?

Counsel for the defendant objects to the question asked the witness on the ground that it is irrelevant and immaterial to the issues involved in this case, and because it is leading.

A. There was a division of three to one,—three for specific
709 brands or closed specifications, and one for open specifications.

Q. Three were for the old system of closed specifications, and one was for open specifications?

A. Yes sir.

Q. Which one of the board,—which member of the board of public works was for open specifications?

Counsel for the defendant objects to the question asked the witness on the ground that it is irrelevant and immaterial to any of the issues in this case, and because it is leading, and does not call for the best evidence.

A. The president of the board was the one who voted for open specifications.

Q. Who was that?

A. The president of the board, and Mr. George S. Graham is his name.

Q. I will ask you if the other three members of the board of public works who did not follow your advice on the subject, and stood for closed specifications in the matter of asphalt street pavements, were lawyers.

A. They were not. None of them were lawyers.

Q. Do you remember that in the year 1897 there was an investigation by a committee of the lower house of the common council as to whether the Parker-Washington Company could furnish Trinidad Lake asphalt for street paving?

A. Yes sir I do recollect of an investigation of that kind at that time.

Q. I will ask you if Mr. Hugh J. McGowan or other representatives of the Barber Asphalt Paving Company were there and attended that investigation?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case.

A. Yes sir it is true that Mr. Hugh J. McGowan attended that investigation made by that committee of the lower house of
710 the common council, and the Barber Asphalt Paving Company was also represented at that investigation by its counsel or attorney, Mr. W. C. Scarritt.

Q. Well were or was the Parker-Washington Company or any of its officers or agents called to the witness stand on that occasion to tell how and where they got or could get Trinidad Lake asphalt?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and also for the reason that it does not call for the best evidence.

A. Yes sir, Mr. McCormack, the president of the Parker-Washington Company or one of its officers, for I don't know or remember now whether he was its president or not,—at all events he was one of its officers,—he was put on the witness stand and examined by the committee as to where he got his asphalt.

Q. Now I will ask you who questioned him upon that subject?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it does not call for the best evidence.

A. The attorneys for the Barber Asphalt Paving Company did most of the questioning. The members of the committee did some questioning also.

Q. Do you remember whether or not the attorneys for the Barber Asphalt Paving Company suggested any questions to the committee to be asked to Mr. McCormack on that subject?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case.

A. Yes sir, I think they did. I am under the impression that they did. I know they participated in the examination in that way,—according to my recollection.

711 Q. What other attorney appeared there besides Mr. W. C. Scarritt?

A. My recollection is that Mr. J. H. Harkless was there along about that time participating in those investigations.

Q. Was there much time spent on the question or subject?

A. I think a good deal of the time for several days off and on.

Q. What year was that?

A. According to my best recollection it was in 1897.

Q. Did you ever hear Mr. McGowan or Mr. Scarritt,—either or both of them state that the Parker-Washington Company could not furnish the Trinidad Lake asphalt?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues involved in this case.

Q. Just wait and don't answer now, for I want to change that question. Did you at the time of that investigation and before that committee or elsewhere, during the year 1897, hear Mr. McGowan and Mr. W. C. Scarritt, as the representatives of the Barber Asphalt Paving Company, either claim or state that the Parker-Washington Company could not furnish the Trinidad Lake asphalt?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it calls for hearsay testimony, and because it calls for a narrative or relation of conversations between persons not in any way parties to this action, and because it is not proper testimony.

A. I don't recollect of Mr.——

Counsel for the defendant objects to the question on the further ground that it is leading and suggestive.

A. I do not recollect of Mr. W. C. Scarritt saying any thing particularly about it, but Mr. Hugh McGowan was continually

712 asserting that the Parker-Washington people could not procure or produce Trinidad Lake asphaltum, and he contended that such asphalt as they did have, must be land asphalt and not lake asphalt, for as I said before his contention was that the Parker-Washington Company could not get any lake asphaltum.

Q. Do you mean Trinidad Lake asphalt?

A. Yes sir.

Q. It was Trinidad Lake asphalt that he contended the Parker-Washington Company could not procure?

A. Yes sir.

Q. I will ask you whether Mr. McGowan, ——?

A. Excuse me,—I should add that he said they could not get it unless they got it from them, or his company.

Q. That is from the Barber Asphalt Paving Company? That is what you mean?

A. Yes sir.

Q. Unless they got it from the Barber-Asphalt-Paving Company they could not get it at all?

A. Yes sir, that is what he said. Of course they have another name for it, but it is the same concern.

Q. Do you mean that Mr. Hugh J. McGowan said that?

Counsel for the defendant objects to the last answer of the witness, and moves the court to strike it out on the ground that it is not responsive to the question.

A. They have some other name down there in the east that the Barber Company goes by.

By Mr. JONES: "I object to that because it is not proper testimony."

By Mr. FIELD:

Q. Is it the Trinidad Lake Asphalt Company?

A. Well I don't know positively what the name is, but it is some such a name as that. It is virtually the same thing under another name.

By Mr. JONES: "The last part of the answer I move to be stricken out for the same reason."

By Mr. FIELD:

713 Q. Now did you say that it was Mr. Hugh J. McGowan that you heard make these same statements before that committee of the common council at its sessions investigating this matter?

A. Yes sir.

Q. Now where did you hear him make them?

A. I heard him make them around the offices there in the city hall, and around in the corridors and while going up in the elevator, and also as I said at the time the investigation was going on.

Q. The investigation of this subject?

A. Yes sir.

Q. Now Mr. Middlebrook have you been familiar with the city hall affairs of Kansas City, Missouri during 1896 and 1897?

A. Well not in 1896, but I have been since April 1897 or rather since the latter part of April 1897.

Q. Have you since that time been a regular attendant at the council meetings whenever they convened?

A. I have been whenever not otherwise occupied. I have attended pretty regularly.

Q. Have you been before the board of public works frequently too?

A. I have been at pretty near every meeting they have held.

Q. Do you know whether Mr. McGowan was usually present during the year 1897 at the council meetings and also at the meetings of the board of public works during that time?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues involved in this case.

A. He was frequently there in person, and when not there in person generally some of his representatives or associates were there.

Q. Do you know whether or not these persons you have referred to as being present on such occasions, and whom you have designated as his associates or representatives, were associated with him in procuring street paving contracts for the Barber Asphalt Paving Company?

A. Yes sir.

Q. They were?

A. Yes sir.

714 Q. I will ask you Mr. Middlebrook, what in your opinion, was Mr. McGowan's influence before the city counsel of Kansas City, Missouri, and the board of public works of Kansas City, Missouri. Was it great or small?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that it calls for a mere opinion and conclusion of the witness, and not for the facts.

A. You asked me what Mr. Hugh McGowan's influence was with the common council and the board of public works?

Q. Yes sir.

A. His influence was apparently very great.

Q. Well would that be your deliberate, candid judgment, that his influence before the common council, and the board of public works of Kansas City, Missouri, was great?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, to any of the issues involved in this case, and for the reason that it calls for a mere opinion or conclusion of the witness, and not for the facts.

A. Yes sir, that would be my judgment.

Q. Then it is your judgment that Mr. Hugh J. McGowan was a man of very great influence before the council and the board of public works?

Counsel for the defendant objects to the question asked the wit-

ness for the reason that it calls for a mere opinion and conclusion of the witness, and because it is irrelevant and immaterial, to any of the issues in this case.

A. Yes sir.

Q. What were his methods in getting contracts down there? What did he do if anything? Was what he did done before the council, or was it out of session?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it calls for an opinion or conclusion of the witness. It is also objected to because it is not shown that the witness knows of his own knowledge what Mr. McGowan's methods were, or whether he had any methods.

A. Well with reference to his methods in securing contracts, as well as his methods could be seen by me, it seemed that he had a very effective and well drilled corps of promoters and assistants, who procured signatures to petitions asking for the pavements of streets with genuine Trinidad Lake asphalt, and these petitions which these promoters secured were placed before the board of public works, either by Mr. McGowan or some of his employees or associates for adoption, and the board of public works, with hardly any exceptions adopted the method of paving recommended or prayed or asked for in these petitions. These adoptions by the board of public works were in the form of resolutions recommending that these streets be paved with this particular kind or brand of asphalt, which in such cases was invariably Trinidad Lake asphaltum. These recommendations or resolutions were then passed on up to the council, where they were ripened into ordinances, and these ordinances were hardly without exception passed with great expedition by the council, and then the contracts would be awarded, and at the meetings of the council when the contracts were to be confirmed after having been awarded, Mr. McGowan and his assistants or associates, or some of them would be present. At the meetings of the council after the contracts were awarded, and when they were to be confirmed,—that is the ordinances to pave the streets were being passed, as I said, the promoters and associates of Mr. McGowan, and sometimes he, himself, personally and individually, would be present in and about the corridors of the city hall leading to the council chambers, or rather "the lobby" for that is the right name for it.

Q. Did he ever make any speeches in open sessions of the council,—either he or any of his associates or representatives,—on the question of adopting resolutions or confirming contracts for the paving of streets with Trinidad Lake asphalt?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that it calls for an opinion or conclusion of the witness.

A. I do not recall any speeches made by any of them in open session of the council at this time.

Q. That is all.

By Mr. JONES: "Counsel for the defendant moves the court to strike out all the testimony of this witness for the reason that the questions and answers thereto are not material or relevant to any of the issues in this case, the questions are leading and suggestive and the answers are not responsive, and the questions do not call for the best evidence and seek to bring out secondary and hear say evidence".

Q. I have no questions to ask.

R. B. MIDDLEBROOK.

Sworn to before me on the day, within the hours, and at the place in that behalf first aforesaid, and subscribed in my presence this 17th day of September, 1900.

[SEAL.]

JOHN M. ORR,
Notary Public, Jackson County, Missouri.

A. S. MARLEY, of lawful age, being produced, sworn and examined on the part of the complainant, deposeth and saith,

Direct examination by Mr. FIELD:

Q. State your name?

A. Albert S. Marley.

Q. What is your age Mr. Marley?

A. I am thirty nine years of age.

Q. What is your residence and occupation?

717 A. My residence is in Kansas City, Jackson county Missouri, and by profession I am a lawyer.

Q. Were you ever city attorney of the city of Westport before its absorption by Kansas City, Missouri, and if so state when you were such city attorney of Westport?

A. I was city attorney of Westport from along some time in the fall of 1895, I think it was either in September or October 1895 that I was appointed city attorney of Westport, and I was such city attorney up to the time of the annexation of the city of Westport to Kansas City, which, if I am not mistaken, was the 2nd or 3rd of December 1897.

Q. I believe you were called in this case before as a witness on the part of the defendant, were you not?

A. Yes sir, my deposition was taken, but I don't know whether it was in this case or not.

Q. Well when you were the city attorney of Westport did you attend the meetings of the board of aldermen of that city?

A. Yes sir I attended all the meetings of the board of aldermen as I remember it. I think I attended every meeting of the board, but possibly there might be an exception to that statement, for possibly there was one or two meetings that I did not attend. If I missed

any of them it was because there was not any thing pending before them of any importance.

Q. Now I understand you to say that you were the city attorney of Westport in the years 1895, '96 and '97,—that is you were the attorney of the city of Westport during those years?

A. Yes sir. From the time I was appointed in 1895 down to the time of the annexation.

Q. Do you remember about the Barber Asphalt Paving Company paving streets in Westport?

A. Yes sir.

Q. What streets did they pave?

A. They paved as I remember it now,—Linwood avenue, Main street, Baltimore avenue and Wyandotte street.

Q. And other streets also?

A. Yes sir, I think several other streets. I don't know as I can enumerate all of them now. They paved Warwick boulevard, but that was some time before, and they paved other streets also.

718 They paved Longmeadow and Woodworth avenue and other streets also.

Q. Do you remember or do you recall the introduction and passage of resolutions and ordinances concerning Trinidad Lake asphalt or the pavement of streets with Trinidad Lake asphalt and Barber Asphalt Paving Company contracts for paving with Trinidad Lake asphalt?

A. Yes sir I recall the fact that the resolutions were introduced and published, and that the ordinances were passed.

Q. I will ask you if you observed the course of proceedure in the adoption of resolutions and ordinances concerning these matters?

A. Yes sir. That is to say at such times I would be sitting in the council chamber there as the legal adviser of the council, and of course I observed the proceedings.

Q. I will ask you whether during your time as city attorney of the city of Westport, or during your residence in Westport, in the history of the city of Westport, any company or corporation other than the Barber Asphalt Paving Company has laid any asphalt paved streets in the city of Westport?

Counsel for the defendant objects to the question asked the witness on the ground that it does not call for the best evidence of the fact sought to be proved, and because it is incompetent, irrelevant and immaterial to any of the issues in this case.

A. No sir I have no recollection of any other company or firm laying asphalt on streets in the city of Westport, other than the Barber people.

Q. Do you recall the attendance on the sessions of the board of aldermen, when the matter of asphalt street pavements were under consideration and the passage of resolutions and ordinances affecting such matters were under consideration,—the attendance of Hugh J. McGowan or Mr. Norris or Mr. Getty?

719 Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and also on the ground that it is leading and suggestive.

A. Yes sir.
Q. How?
A. Yes sir, I recall their being present on occasions.
Q. You recall their being present?
A. Yes sir, I recall the parties mentioned as being in attendance.
Q. At meetings of the board of aldermen of Westport?
A. Yes sir. I only recall Mr. Hugh J. McGowan's being present on one occasion,—that is I have a sort of a general recollection, and yet a pretty distinct recollection of his being present once; but Mr. Jim McGowan and Mr. Getty and Mr. Norris,—some or all of them, were present at every meeting while I was city attorney of Westport, whenever any thing pertaining to asphalt paving was before the council.

Q. What did you observe their doing out there on such occasions in the way of promoting the passage of resolutions or ordinances or awarding contracts?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and also on the ground that it is leading and suggestive.

A. Well at least two of them,—that is Mr. Jim McGowan and Mr. Getty were there, and some times all three of them would be there,—that would be the two I have mentioned and also Mr. Norris.
Q. You mean Mr. James B. McGowan, Mr. Getty and Mr. Norris?
A. Yes sir sometimes all three would be there, and sometimes it would be only two of the three that would be there, but they would be there I would say and were there, at every meeting of the council when there was any ordinance up for passage that involved public improvements in the way of paving. Of course they were
720 around there talking with the aldermen, and of course they also talked with the city officials,—they have even talked with me, for they were pretty nice friendly, sociable fellows, so of course they circulated around and mixed with people and were on good terms with all of us, for as I said before they were courteous and good fellows hail, fellows well met, and we were mixing with them, so I say they were on good terms with all the city's representatives and officials.
Q. Well were they engaged in treating people in saloons and other places where wines and liquors were sold, to wines and cigars and so on?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it does not call for proper testimony.

A. Well of course frequently before the meetings of the council, and sometimes afterwards,—probably the boys would gather in one of the saloons there, and generally Mr. Getty or Mr. Jim McGowan might treat the boys to wine or beer or cigars, or ask them to have something, and they generally took something,—generally it was just beer or a cigar,—it was just an ordinary treat,—that would be all.

Q. Well this communication they had with the board of aldermen, was that before the session of the board of aldermen, or was it during the session?

A. Well generally it would be either before or after the session. Now I think I can make it clear by making a statement as to the location of the offices of the city and the council chamber. The offices and the council chamber were not in the same building. Our council chamber was over on another street where the jail was; but the clerk's office, the city engineer's office and the collector's office were in another building on Westport avenue,—on the corner as I remember it of Westport avenue and Washington street, and usually all the city officers, the members of the council, and myself as city attorney would gather at the city clerk's office with the city
721 engineer, and after we would all get together in that way, then we would go over to the council chamber where the legislative proceedings were had and held, and previous to our going over and usually while waiting for the councilmen to come up we would all be there talking and cracking jokes with one another and laughing; and then it was that Mr. McGowan and Mr. Norris,—well I will say more particularly Mr. McGowan,—that is Jim McGowan and Mr. Getty for they were rather more sociable than Mr. Norris,—they would be there talking with all of us promiscuously,—the city officers as well as members of the council.

Q. So it was generally before the sessions of the city council of Westport, that this communication between Getty and McGowan was had with the aldermen?

A. Yes sir, there generally was more time to talk and attend to the social phase of the situation, but their talk was nothing more than is usual among men who are sociable and on good terms. I say there was more time to do talking before the session of the council than afterwards, because after the meeting was over the members usually scattered and each took their way home, this one going north and that one south or go off somewhere to take a car to their homes for it was usually late, and the aldermen living in different directions would go home.

Q. Did you ever draw any ordinance or resolutions declaring the work necessary for streets that were to be paved, or any ordinances that were drawn declaring the work necessary, or approving the contracts?

A. No sir.

Q. Were any of these ordinances ever referred to you for an opinion as to their legality?

A. No sir.

Q. They were not?

A. No sir.

Q. You were the city attorney and the adviser of the council on all legal questions?

A. Yes sir I was the city attorney, and I supposed their legal adviser.

722 Q. And the questions that came up were referred to you?

A. Yes, sir, all the questions that came up were referred to me.

Q. Well that is what I want to get at? Were the legality of the resolutions and ordinances that came up ever referred to you?

A. Yes sir. Now let's understand each other. There have been resolutions and ordinances referred to me for my opinion as to their legality and regularity but no resolutions or ordinances with reference to paving with Trinidad Lake asphalt were ever referred to me.

Q. Then you never drew any resolutions or ordinances on the question or subject of paving with Trinidad Lake asphalt,—such resolutions were never referred to you for your opinion as to their legality?

A. No sir.

Q. In no instance was that done?

A. No sir. I don't recall any case or instance where that was done.

Q. Do you know who prepared them?

A. No sir. Not of my own knowledge.

Q. Have you ever seen any of these resolutions that were offered,—resolutions or ordinances that were prepared for street paving with Trinidad Lake asphalt,—before they were offered or introduced or filed with the city council?

A. No sir I don't think I ever did. I will tell you,—my recollection of that is this, that these ordinances were brought there by Mr. Jim McGowan or Mr. Getty and I think perhaps once or twice by Mr. Norris, and they were preapared as I understand it by the legal department or the lawyers,—their own lawyers.

Q. By their own lawyers?

A. Yes sir.

Q. Whose lawyers?

A. The lawyers of the Barber Asphalt Paving Company.

Q. Does that refer to the ordinances?

A. Yes sir.

Q. Does that also include the resolutions?

A. It includes all the steps necessary to be taken from the very first step to the very last step right on down to the issuance of the tax bills.

By Mr. JONES: "Just note in there an objection to the last

723 four questions*ions* and also a motion to strike out the answers because they are not responsive to the questions and not purporting to state the facts, but are a statement merely of the idea or

understanding of the witness, and do not purport to state any facts that he knows of his own knowledge; and the questions are objected to because they are immaterial and irrelevant to any of the issues in this case."

By Mr. FIELD:

Q. Well I will ask you right on that line whether or not what you have stated with reference to Getty or Norris or Jim McGowan or either of them bringing out ordinances and resolutions, whether you do know that to be a fact?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case.

A. Yes sir.

Q. You know that to be a fact?

A. I do. I know that they brought out resolutions and ordinances and handed them to the city clerk for I have seen them do so. As to their contents I do not know, but I do know that I have seen them bring out bundles of ordinances and resolutions, and I have seen them hand them to the city clerk.

Q. On evenings when the resolutions and ordinances were to be introduced?

A. Well yes. They were never there at other times, only when meetings of the council were held. That is I did not see them if they were at other times.

Q. Well would that be some evening when ordinances and resolutions were introduced?

A. Yes sir, there would be some proceedings of that kind.

Q. Do you know what kind of a type-writing machine was used in the city clerk's office out there in Westport at that time?

A. I think,—as I remember it, it was a Yost.

724 Q. It was a Yost?

A. Yes sir.

Q. That was the make of the type-writer, was it,—that is the name of the make of type-writer that was used by the city clerk of Westport in his office?

A. Yes sir. That is the name that was on the machine, as I remember it.

Q. Mr. Marley I will ask you from what you observed in and about the council out there in Westport, during your term of office as city attorney, and your intercourse with and between Mr. Hugh J. McGowan and Jim McGowan, Mr. Norris and Mr. Getty, and from what you observed of their association and intercourse with *with* the aldermen of the city of Westport and the city engineer of Westport,—whether from that observation you would say that their influence with the aldermen of the city of Westport and the city engineer of Westport was great or small?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial

to any of the issues in this case, and for the reason that it calls for a mere opinion and conclusion of the witness.

Q. Answer the question?

A. Well with reference to Mr. Norris, I will say that Mr. Norris was more reserved, and was not, apparently, inclined to mix like Jim McGowan and Mr. Getty were, and for that reason I would not consider his influence as strong as theirs. They were all good fellows, but as I said, Mr. Norris was more reserved than the others, and that is the reason I say I don't think his influence was as strong as the others. That is I mean to say I would not consider him to be as influential as the others were; but I always considered Mr. Jim McGowan and Mr. Getty as men of considerable influence among the city officials. They were very nice social fellows, and they were popular, and hail fellows well met, and good mixers, and they were always popular with the mayor and aldermen and city officials,—in fact they were on good terms with all the city officials from the mayor down.

725 Q. I will ask you if during your term of office there was ever a resolution or ordinance offered there to pave a street with Trinidad Lake asphalt, or to confirm a contract with the Barber Asphalt Paving Company for such paving, that ever failed of adoption by the board of aldermen?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to the issues in this cause, and because it does not call for the best evidence of the fact sought to be proven, the records of the board of aldermen being the best evidence.

A. I do not recollect of any ordinance or resolution being defeated.

Q. Take the witness.

By Mr. JONES: "Counsel for the defendant moves the court to strike out all of the questions asked this witness, and the answers thereto on the ground that neither the questions asked nor the answers given are relevant or material to any of the issues in this case, and because they call for and are mere opinions and conclusions of the witness, and not calling for the best evidence.

Q. I have no cross-examination.

A. S. MARLEY.

Sworn to before me, on the day, within the hours, and at the place in that behalf first aforesaid, and subscribed in my presence this 13th day of September 1900.

[SEAL.] JOHN M. ORR,
Notary Public, Jackson County, Missouri.

It being impossible to complete the taking of depositions herein on this day, by agreement of the parties represented as aforesaid, I do hereby continue the further taking of depositions herein until

Tuesday the 14th day of August 1900 at the hour of 2 o'clock p. m., then to be resumed and continued at the place in that behalf aforesaid.

[SEAL.] JOHN M. ORR,
Notary Public, Jackson County, Missouri.

Now on this day, being the 14th day of August 1900 at the hour of 2 o'clock p. m. came the parties hereto, represented as aforesaid, and the further taking of depositions herein was resumed and continued pursuant to adjournment as above noted.

726 GEORGE L. LOVE, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith:

Direct examination by Mr. FIELD:

Q. Dr. Love, you are the same George L. Love, ex-city clerk of the city of Westport, who has heretofore given your deposition a number of times in this case?

A. Yes sir. I have been examined several times,—I don't know how many.

Q. What contractors or paving companies have laid Trinidad Lake asphalt on the streets in the city of Westport?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that it does not call for the best evidence.

A. The Barber Asphalt Paving Company is the only company that has laid Trinidad Lake asphalt that I know anything about. That is the only company that has done that kind of paving.

Q. How many streets did they pave out there in Westport with asphalt?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it does not call for the best evidence.

A. Well I can't answer that off hand. That is some thing I would have to think over for a while. I think though there was some 15 or 16 contracts let to them.

Q. Before these three pavements in question in this case, I will ask you whether they paved Warwick boulevard from 35th to 45th, McGee street from 31st to 33rd streets, Campbell from 31st to 32nd, Harrison — 31st to 34th streets, Troost from 31st to 33rd streets, Spring street from Main street to Linn's addition, 32nd street from Main to McGee streets, 32nd street from Cherry to Troost, 34th street
727 from Main to Oak west, Woodworth avenue from Main to Oak streets, 35th street from Main to Wyandotte, 36th street from Wyandotte to Holmes streets?

A. Well, all but Warwick boulevard. You have that to 45th street and they only went down to 44th street I think it was.

Q. Well the streets or parts of the streets I have named were paved, each under different contracts were they not?

A. Yes, sir.

Q. And some of them,—on 36th street there was two contracts,—that is two separate contracts for its pavement from Wyandotte to Holmes streets?

A. Yes sir.

Q. What asphalt other than Trinidad Lake asphalt was ever called for in the specifications there for asphalt pavements?

A. I don't think there was ever any advertisement for any other kind of asphalt other than Trinidad Lake asphalt. In fact I know there was not.

Q. What was the method of instigating and carrying through the proceeding on these various streets? I will ask you generally whether the method of adopting resolutions declaring the work necessary, and ordering the work to be done, and contracting for it was the same on the streets other than Main street, Baltimore avenue and Wyandotte street, that were employed on these three streets?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial, to any of the issues in this case, and for the reason that it does not call for the best evidence.

A. I think the same proceedure was followed in every case excepting in the case of Warwick boulevard, and perhaps also in the case of Woodworth avenue.

Q. Well I mean with respect to contractors presenting petitions signed by the property owners; whether those petitions were presented the same as in the case of Main street, Baltimore avenue and Wyandotte street as heretofore testified to by you I believe?

728 Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it does not call for the best evidence.

A. I think that in every case, with the posssble exception of War wick boulevard, and I don't remember, or I am not positive as to Warwick boulevard, but I think there was a petition for that as well as for the others. There was in every case, I say, with the possible exception of Warwick boulevard, there was a petition presented asking for the pavement, and as I said, I believe that was the case with Warwick boulevard also.

Q. Well now as I understand you, a petition would be presented to the board of aldermen of the city of Westport by Mr. McGowan or some of his representatives, signed by the property owners,—that is a petition would be presented by Mr. Jim McGowan or Mr. Getty, signed by the property owners, and then a resolution would have to be presented in the council declaring the work to be necessary to be done, and when it was advertised for bids, then the contract would be

awarded to the Barber Asphalt Paving Company, and the ordinance approving the contract would then be introduced and passed?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it assumes facts not in evidence, and does not call for the best evidence.

A. Yes sir. That was the usual proceeding.
Q. That was the course of procedure?
A. Yes sir.
Q. Now was any resolution ever offered there to the city council, declaring the work necessary to be done,—that is to pave a street with Trinidad Lake asphalt, unless it was upon a petition filed there by the contractors as I have stated?

729 Counsel for the defendant objects to the question asked the witness on the ground that it does not call for the best evidence, and because it is incompetent, irrelevant and immaterial to any of the issues in this case.

A. There was never any resolution drafted without a petition.
Q. A petition brought there by whom?
A. I think in nearly every instance,—in fact I will say in every instance that I knew any thing about it was brought by the representatives of the Barber Asphalt Paving Company.

Counsel for the defendant objects to the question asked the witness, and the answer thereto on the ground that it is immaterial and irrelevant to any of the issues in this case, and for the reason that it does not ask or call for the best evidence, and because it calls for an opinion and conclusion of the witness.

Q. You mean Mr. Hugh J. McGowan or Mr. Jim McGowan or Mr. Getty I suppose when you say some representative of the Barber Asphalt Pa-ing Company.
A. I expect that Mr. Norris filed some of them. I don't think that Mr. Hugh McGowan ever filed any. That is I don't believe he ever filed a petition himself.
Q. Well you mean Jim McGowan, Getty or Norris?
A. Yes sir.
Q. One of these three filed it?
A. Yes sir.
Q. And your recollection is that there never was a resolution declaring the work necessary to be done, excepting on a petition filed there by one of these three,—Jim McGowan, Getty or Norris?
A. Yes sir that is my recollection.
Q. Well did you ever know of the council passing a resolution declaring the work necessary to be done until they came there with a petition?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and imma-

terial to any of the issues in this case, and because it calls for
730 the opinion and conclusion of the witness.

A. No sir, they always acted on a petition and in conformity with it. That was the invariable practice.

Q. I will ask you if it was a custom, or generally understood when they brought a petition there, that a resolution would be passed declaring the work necessary to be done?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, because it is leading and suggestive and calls for a mere opinion or conclusion of the witness.

A. Well that is what I expected to follow always, and I supposed that it was the general opinion that it would be.

Q. What would be?

A. That a resolution would be passed declaring the work necessary to be done.

Q. Well was there a resolution passed by the council declaring the work necessary to be done, followed by an ordinance ordering the work to be done, and an ordinance giving the contract to the Barber Asphalt Paving Company, and an ordinance confirming the contract,—did these proceedings always follow such a petition?

Counsel for the defendant objects to the question asked the witness on the ground that it is leading and suggestive, and because it is not material or relevant to any of the issues involved in this case, and for the reason that it calls for a conclusion and an opinion of the witness.

A. Yes sir.

Q. Was there ever an ordinance, excepting possibly the one for Warwick boulevard that was let under any different circumstances?

Counsel for the defendant objects to the question asked the witness on the ground that it is not relevant and material to any of the issues in this case, and because it calls for a conclusion of the
731 witness, and is leading and suggestive.

A. I can't say with reference to Woodworth avenue, but I think that was done before the charter requirement regarding the publication of the resolution was adopted. All the others were.

Q. Well as I understand you, you say that both Woodworth avenue and Warwick boulevard were let under different circumstances?

Counsel for the defendant objects to the question on the ground that it calls for an opinion and conclusion of the witness, and because it is not competent, irrelevant or material to any of the issues in this case.

Q. What is the question?

Q. As I understand you, Woodworth avenue and Warwick boule-

vard,—do you mean to say that they were not done under petition, and the notices were not published?

A. What I mean to be understood as saying is that there was no resolution declaring the work to be necessary.

Q. Of course under the laws in force then it was not necessary?

A. No, sir.

Q. Well were these streets paved on petition, the same as the others?

Counsel for the defendant objects to the question asked the witness, on the ground that it is calling for a mere conclusion of the witness, and is not competent, relevant or material to any of the issues in this case.

A. Yes sir, that is my recollection.

Q. Well now how long before Main street was paved, which was the first one of these streets in question to be paved, had this street paving been done there?

A. I don't understand that.

Q. I mean how long prior to the paving of Main street, was Warwick boulevard paved, for instance?

A. Well four or five years I think, but I don't remember exactly. I think Warwick boulevard was paved in 1892 and Main street was paved in 1897.

732 Q. Well when were these other streets paved, prior to the Main Street paving I mean?

Counsel for the defendant objects to the question asked the witness on the ground that it does not call for the best evidence, and is not relevant, competent, or material to any of the issues in this case

A. Well nearly all the asphalt paving that was done out there was done in 1897 I think.

Q. That was about the same time that these three streets in question were paved?

A. Yes sir. All excepting Woodworth avenue, and that was paved in 1895 I think.

Q. How is that?

A. I say all excepting Woodworth avenue and that was paved in 1895 I think. Possibly it was in '96, '95 or '96.

Q. Troost avenue was paved before Main street?

A. Yes sir.

Q. And also 32nd street?

A. Yes sir. I think so,—part of it I know was.

Q. Now what was done with these petitions of the property owners petitioning for asphalt pavements when brought up before the council?

A. What was done with them?

Q. Yes sir. Were they read in the open council?

A. Yes sir.

Q. Were any questions asked by the board of aldermen or by any one else as to the methods pursued in procuring the names or signa-

tures of the property owners, whose names appeared on these petitions?

A. I never heard any one ask any questions.

Q. Was the contractor or the person who presented the petitions ever asked any questions about how he got these names?

A. No sir. I never heard any questions asked about that.

Q. The petitions were received without any questions whatever being asked?

A. Yes sir.

Q. And were acted on without any questions?

Counsel for the defendant objects to the question asked the witness on the ground that it is not competent, relevant or
733 material to any of the issues involved in this case, and because it calls for an opinion of the witness.

A. There was no question asked about it at all.

Q. Was it a matter generally known there in Westport, and around the city offices that the McGowan's went out and got these signatures from the owners of property?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it calls for a conclusion and opinion of the witness, and not calling for the best evidence.

A. It was the general supposition or understanding that the work of procuring these petitions was promoted by the company.

Q. By the company?

A. Yes sir.

Q. By Hugh McGowan you mean don't you?

A. Well I don't know. I suppose he was the man, for he was the head of it.

Q. Did he have a separate office from the construction office of the Barber Asphalt Company's office, or did he occupy the same offices?

A. He had a seperate office.

Q. Do you know whether or not he maintained an office on his own account?

A. No sir, I don't know anything about that.

Q. Did you have a type-writing machine there in your office while you were city clerk of Westport, that you used for preparing ordinances and resolutions?

A. Yes sir.

Q. What kind of a type-writing machine was it?

A. It was a Yost.

Q. A Yost?

A. Yes, sir. That is what it was called.

Q. Did you have any other kind or style of a type-writing machine there?

A. No sir.

Q. It has heretofore appeare- in evidence in this ease that the reso-

utions and ordinances concerning the pavement in question on Wyandotte street and Baltimore avenue, were prepared by Mr. Griffith of the firm of Scarritt, Griffith and Jones. Now I
734 will ask you whether these ordinances and resolutions were recopied in your office or not?

A. No sir, not for introduction.

Q. Well they were copied were they not?

A. Yes sir, there was a copy made of them.

Q. How and where were they copied?

A. They were copied into the permanent records of the office.

Q. That was after they were passed?

A. Yes sir.

Q. Well you recorded all ordinances after they were passed did you not?

A. Yes sir.

Q. But the original ordinances and resolutions were passed just as they were written?

A. Yes sir.

Q. Now do you know whether or not the Main Street resolution,—that is the resolution declaring the work of paving Main street necessary was drawn in your office, or the ordinance ordering the work to be done or the ordinance approving the contract was drawn in your office?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case.

A. I don't think any of them were.

Q. You don't think any of them were drawn in your office?

A. No sir, not for the work on Main street. In fact I am sure they were not.

Q. Now I will hand you a batch of ordinances and ask you to pick out the ones which you know were written on your own typewriting machine?

Counsel for defendant objects to the question asked the witness on the ground that it is not competent, relevant or material to any of the issues in this case, and also for the reason that the batch of papers handed the witness have not as yet been introduced in evidence or further identified."

A. Well ordinance # 1976, being an ordinance levying a specia assessment for the issuing of tax bills for the paving of Main
735 street, was prepared in our office.

Q. That was prepared in your office?

A. Yes sir.

Q. In the office of the city clerk?

A. Yes sir.

Q. And was it prepared on your type-writer?

A. Yes sir.

Q. Now look at the rest of them and see if you can find another

ordinance that was prepared on your machine that you say was a Yost type-writer?

A. Yes sir, here is another one,—# 2046, levying special assessments for the issue of tax bills for paving Baltimore avenue. That was prepared on our machine also. The one appropriating money was prepared on our machine also.

Q. I will ask you generally Doctor what the papers are that you hold in your hand there?

A. What they are?

Q. Yes sir. Describe them in a general way.

A. They are ordinances of the city of Westport, and I believe all of them relate to public improvements.

Q. Well state whether or not they relate to,—including the three which I now hand you,—the asphalt pavements laid in the city of Westport by the defendant company?

Counsel for the defendant objects to the question asked the witness on the ground that *they are* irrelevant and immaterial to the issues in this case, and because the question does not call for the best evidence.

A. Yes sir.

Q. That is the ordinances ordering the work, and ordinances approving the contracts with the Barber Asphalt Paving Company I mean on streets other than the three streets in controversy?

Counsel for the defendant objects to the question asked the witness on the ground that it is not relevant or material to the issues in this case, and does not call for the best evidence.

A. Yes sir, they all relate to paving.

Q. To paving done by the defendant company?

A. Yes sir.

736 Q. They all relate to contracts for paving done by the defendant company?

A. Yes sir.

Q. Now how many of those ordinances are there?

A. There is twenty here.

Q. Well that means ten pavements I suppose?

A. I don't know how many streets are included in this bunch.

Q. Well that would mean ten different pavements,—if there is twenty ordinances. There is one ordering the work and one approving the contract?

A. Yes sir.

Q. Now I will ask you Doctor, whether in your opinion these ordinances were written or prepared on your type-writer? I believe they are all prepared on the same type-writer?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent and irrelevant, and immaterial to any of the issues in this case; and also for the reason that the witness has not as yet been shown to be qualified to express an opinion as to what type-writer they were written on."

A. They are all type-written. There is no question about that. We will all agree on that, and from the general appearance of the ordinances I would say that I do not think any of them were prepared on my type-writer. I do not think any of them were written or prepared in our office.

Q. Now I will ask you if you have observed anything about the fasteners that are used in fastening them together,—that is used in fastening the sheets of paper in each of these ordinances? There is a cover there and a fastener, and what I want to know is if it is like anything used in your office?

Counsel for the defendant objects to the question asked the witness on the ground that it is not relevant or material to any of the issues in this case, and because it calls for an opinion and conclusion of the witness."

737 A. Yes sir, these I observe are fastened with eyelets, and we did not use eyelets in our office.

Q. What about the cover? Did you use the kind of a cover that these 20 ordinances have on them?

A. We might at some time have used covers similar to some of these, but in the great majority of cases I am sure that we never had any covers like these at all.

Q. And as I understand you, you say, that you never used that kind of a cover at all?

A. I say we might have used a cover like this at times, but in the majority of cases we used a different kind of a cover,—a different color from this.

Q. Do I understand you to say that you never used fasteners for papers like this here, at all?

A. No sir we did not use that kind.

Q. That is an eyelet and to put in an eyelet requires some kind of a machine?

A. Yes sir, it requires an eyelet punch.

Q. Now I will show you the ordinances and resolutions for Main Street pavement, also for the paving of Baltimore avenue and Wyandotte street, and ask you if — have the same kind of eyelets and the same kind of cover upon them as has the twenty ordinances that I have shown you on other streets?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and for the further reason that the witness has not as yet been shown to be capable of expressing an expert opinion as to the character of paper covers or eyelets."

A. They all have the same appearance.

Q. Now these fasteners that are on the two levying ordinances that you referred to as having been prepared on your machine, and I refer to ordinances numbered 1976 and 2046,—I will ask you if the fasteners that are on those ordinances are the same as are

738 on the other ordinances that you referred to that you think were not prepared in your office?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and for the further reason that the witness has not as yet been shown to be qualified to answer the question.

A. No sir.

Q. What kind of fasteners are there on the two ordinances which you think were written in your office?

A. It is just a clasp fastener.

Q. On these two ordinances which you think were written in your office accompanying the report of the engineer on the completion of the work and his apportionment of the cost?

A. Yes sir.

Q. Now it seems that these ordinances refer to that report, and I will ask you if the reports were also written on your machine?

A. Yes sir.

Q. They are attached to the ordinances?

A. Yes sir.

Q. I believe that is all.

By Mr. JONES: "Counsel for the defendant moves the court to strike out all the questions asked this witness and the answers thereto made by this witness, for the reason that the same are immaterial and irrelevant to any of the issues in this case, and also for the reason that they don't call for the best evidence, and assume facts that are not in evidence."

Q. I have no cross examination.

G. L. LOVE.

Sworn to before me, on the day, within the hours, and at the place in that behalf first aforesaid, and subscribed in my presence this 7 day of September 1900.

JOHN M. ORR,
[SEAL.] *Notary Public, Jackson County, Missouri.*

A. H. BENSON, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith,—

739 Direct examination by Mr. FIELD:

Q. State your name?

A. A. H. Benson.

Q. Where do you reside?

A. In Kansas City, Missouri.

Q. What is your business?

A. Adjuster for the Remington.

Q. For the Remington type-writer office here?

A. Yes sir.

Q. What did you say you were?

A. A type-writer adjuster.
Q. Are you familiar with the different type-writing machines?
A. Yes sir.
Q. With the Yost,—are you familiar with that machine?
A. Yes sir.
Q. And with the Remington type-writer also?
A. Yes sir.
Q. And also with the Smith-Premier?
A. Yes sir.
Q. And other types of type-writing machines also?
A. Yes sir.
Q. And are you familiar with the work that they produce?
A. Yes sir, I think I am.
Q. Now I will show you,—but first I will ask you if you were present when Dr. Love testified here a few moments ago?
A. Yes sir I was present a part of the time.
Q. And did you hear his testimony?
A. Well I heard a part of it.
Q. Well I mean on the subject of these ordinances, did you hear his testimony?
A. Yes sir.
Q. He testified regarding two certain ordinances which I now hand you, numbered 1976 and 2046, and the report of the engineer accompanying each of them which he testified was written on the Yost machine? Now would that be your judgment from looking at that, or at them?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it has not yet been shown that this witness is qualified or competent to testify regarding the different styles of writing produced on different makes of type-writers, or on the question at issue."

740 A. Those two were written on the Yost typewriter I would say.
Q. They were written on the Yost type-writer?
A. Yes sir.
Q. Well now I will show you ordinances for constructing the pavement on Main street, Baltimore avenue and Wyandotte street which I examined Dr. Love concerning, and each of them have an eyelet fastener, and I will ask you whether each of the resolutions which I now show you affecting these three streets, or the ordinances which I show you were written on the Yost type-writer?

Counsel for the defendant objects to the question asked the witness on the ground that it is incompetent, irrelevant and immaterial to any of the issues in this case, and because it is leading, and for the further reason that the witness has not been shown to be competent to testify in regard to what machine the documents in question were written on."

Q. Answer the question?

Counsel for the defendant objects to the question on the ground that the witness has not qualified himself as an expert so as to render him competent to testify on that point as to the machine that the documents enquired about were written on."

A. These were written on the Remington machine.

By Mr. JONES:

Q. All of them?
A. These three.

By Mr. FIELD:

Q. Now I would like you to look at the twenty ordinances which I now show you for pavements on other streets, and state whether in your judgment they or either of them were written on the Yost machine?

Counsel for the defendant objects to the question asked the witness on the ground that it is not competent, relevant and material to any of the issues in this case, and because the witness has not been shown to be competent or qualified to testify as to the machine that the ordinances referred to in the question were written on."

741 A. You want to know what machine these were written on?

Y. Yes sir?

Counsel for the defendant objects to the question on the further ground that the papers the witness is questioned about have not been introduced in evidence, nor sufficiently identified."

A. These were written on the Yost and these were written on the Remington.

Q. Just give the number of them?

A. Five were written on the Yost machine.

Q. I will ask you whether the five that you say were written on the Yost machine all have eyelet fasteners?

A. Yes sir.

Q. How long have you been in the type-writer business?

A. I have been in the business about twelve years.

Q. Have you been studying the question of writing on these machines?

A. Yes sir.

Q. You think that five out of the 26 ordinances I have shown you were written on the Yost type-writing machine?

A. Yes sir.

Q. Just read the title of the ordinances from the back of them, and also the number?

A. This first one is number 1958 "An ordinance to pave Campbell street from the south line of Springfield avenue to 31st street,

and from the north line of Linwood avenue to 32nd street, and grade that part of Campbell street aforesaid to established grade." The next one is # 1617 "An ordinance to confirm contract to pave Walnut street from 41st to 43rd street." The next one is # 1967 "An ordinance to confirm contract to pave Spring street from the east line of Main street to the east line of Linn's addition, and to grade that part of Spring street aforesaid, to the established grade." The next one is # 1959 "An ordinance to pave 36th street from the eatt line of Wyandotte street to the west line of Holmes street. The next one is # 1957 "An ordinance to pave Harrison street from the
742 south line of Linwood avenue, or 32nd street to the south curb line of 33rd street." Those are the ones that were written on the Yost.

Q. And the others were written on the Remington or the Smith Premier?

A. Yes sir.

Q. Take the witness.

Cross-examination by Mr. JONES:

"Counsel for the defendant moves the court to strike out all the questions asked this witness, and the answers made thereto for the reason that both questions and answers are immaterial to any of the issues in this case, and because the questions are leading, and because the witness has not been shown to be properly qualified to give an expert opinion on the writing or work of different type-writers."

Q. Now you feel pretty positive about your testimony do you Mr. Benson?

A. Yes sir.

Q. Could you pick out among those that you say were written on the Remington and Smith Premier, and could you tell which were written on each?

A. Yes sir I think I can or could.

Q. Well let me see you do it?

A. There is one that is written on the Remington. Do you want me to pick out all that were written on the Remington?

Q. Yes sir?

A. There are all the ones that were written on the Smith Premier.

Q. What are the numbers?

A. Numbers 1977, 1932 and 1613 were written with the Smith, and also number 1934 was written on the Smith Premier.

Q. And numbers 1803, 1818, 540, 1956, 2014, 1362, 1909, 1804, 1948, 1867, 1950 and 1910 you say were written on the Remington type-writer?

A. Yes sir.

Q. Now Mr. Benson you would be very much suprised to learn that every one of these were written on the Smith-Premier would you not?

A. I would.

743 Q. You don't think that can be possible do you?
A. No sir I don't think it can be.
Q. And if any one was to tell you that all these ordinances and resolutions were written on a Remington, you would not be prepared to believe it would you?
A. No sir.
Q. It could not be possible could it?
A. No sir, I don't think it could.
Q. That is all.

A. H. BENSON.

Sworn to before me on the day, within the hours and at the place in that behalf first aforesaid, and subscribed in my presence this 15th day of September 1900.

JOHN M. ORR,
Notary Public, Jackson County, Missouri.

H. L. WHITE, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith,—

Direct examination.

By Mr. FIELD:

Q. State your name.
A. H. L. White.
Q. Where do you reside?
A. Kansas City, Missouri.
Q. Were you present when Dr. G. L. Love, the first witness examined to day, testified that two certain ordinances, numbers 1976 and 2046, levying the tax bills I show you were written on the Yost type-writing machine?
A. Yes sir.
Q. What do you say about that?
A. Well it would be my judgment they were.
Q. That is you say that it is your judgment that the two ordinances which he said were written on the Yost type-writer were so written on the Yost machine?
A. Yes sir.
Q. That would be your judgment?

744 Counsel for the defendant objects to all the questions asked the witness on the ground that they are not relevant or material to any of the issues involved in this case, and because the witness has not as yet shown himself to be qualified as an expert to testify on that matter and because it is leading and assuming matters not in evidence properly.

Q. Well strike the question out and I will qualify him. What did you say your name was?
A. H. L. White.
Q. What is your business?
A. I am manager of the Hammond Type-writer Company here.

Q. You are the local manager of that company here in Kansas City, Missouri?

A. Yes sir.

Q. Are you familiar with type-writer machines?

A. Yes sir.

Q. And are you familiar with the work of the Remington type-writer?

A. Yes sir.

Q. And the Yost machine?

A. Yes sir.

Q. And the Hammond machine also?

A. Yes sir.

Q. That is a different type of a machine from the Yost and the Remington or the Smith-Premier is it not?

A. Yes sir.

Q. Were you present when Dr. G. L. Love the first witness examined this afternoon, who preceded Mr. Benson, the last witness, testified?

A. Yes sir.

Q. Did you hear his testimony wherein he stated that ordinances numbered 1976 and 2046, which I now show you, were written on the Yost machine?

A. Yes sir. I saw him identify certain papers or documents which he said were written on the Yost, but I could not tell you about these numbers.

Q. Well state whether or not these two ordinances having these two numbers 1976 and 2046 were written on the Yost machine?

A. Yes sir, numbers 1976 and 2046 were written on the Yost machine.

Q. They are ordinances that accompany the report of the
745 city engineer of the city of Westport, apportioning the cost of the work etc.?

Counsel for the defendant objects to the last two questions asked the witness on the ground that they are not relevant or material to any of the questions involved in this case, and because the witness has not been shown to be qualified to testify regarding the matrers concerning which he is questioned.

A. I expect they are.

Q. I now show you certain resolutions numbered 540 and two ordinances numbered 1803 and 1818, concerning the Main street pavement in question and I will ask whether in your judgment these ordinances and resolutions were written on a Yost machine?

Counsel for the defendant objects to the question asked the witness on the ground that it is not relevant or material to any of the issues in this case, and because the witness has not been shown to be qualified to testify as an expert.

A. No sir, they were not.

Q. The ordinances I have shown you have a fastener of what kind?

A. An eye let.

Q. How?

A. They are fastened with an eye let.

Q. You say another of these ordinances, or a resolution concerning Main street was written on the Yost machine?

A. Neither of these three papers were. There is two ordinances and a resolution, and neither of these three were written on a Yost machine.

Q. Now I show you a resolution concerning Wyandotte street, which is # 590, and I will ask you what type-writing machine you would say that was written on?

A. Well I would say that was written on a Yost type-writter.

Q. I also ask you an ordinance # 1931 on Wyandotte street, and an ordinance # 1949 concerning Wyandotte street,—one of which is a resolution, and I will ask you whether or not this reso-
746 lution or either one of these ordinances were written on a Yost machine?

Counsel for the defendant objects to the question asked the witness on the ground that it is leading and suggestive, and is not material, competent or relevant to any of the issues in this case, and for the reason that the witness has not been shown to be qualified to testify as an expert, regarding the matters concerning which he is interrogated."

A. No sir I should say not.

Q. Now I will show you a resolution being # 570, concerning the Baltimore Avenue pavement in question, also ordinances numbered 1866 and 1888, concerning the pavement on Baltimore avenue, and I will ask you whether either of the resolutions or ordinances shown you concerning the pavement on Baltimore avenue, which you now hold in your hand were written on the Yost machine?

Counsel for the defendant objects to the question asked the witness on the ground that they are not competent, relevant or material to any of the issues in this cause, and because the witness has not been shown to be qualified to testify as an expert, or give an expert opinion regarding the matters concerning which he is interrogated."

Q. You may answer the question?

Counsel for defendant also objects to the question because it is leading.

A. I should say not.

Q. Now I believe I showed you the ordinances concerning the other streets which Mr. Benson has testified regarding? There are about twenty ordinances affecting other streets than Main, Baltimore and Wyandotte. I now hand you these ordinances and ask you generally whether any of these ordinances affecting other

streets,—first I will ask you as to whether or not you examined them before you took the witness stand?

A. These ordinances?

Q. Yes sir, these twenty ordinances affecting streets other
747 than Main, Baltimore and Wyandotte?

A. You wan't to know whether any of them were written on the Yost?

Q. Yes sir?

A. I would say that none of them were written on the Yost excepting the two which I said were written on the Yost.

Q. You mean the two which I showed Dr. Love and which he identified as being written on the Yost?

Counsel for the defendant objects to the question on the ground that it is not material, relevant or competent to any of the issues in this case, and for the reason that the witness is not shown to be qualified to give an expert opinion concerning the matters regarding which he is interrogated.

A. Yes sir.

Q. Can you tell the difference between the work of a Remington and a Smith Premier?

A. No sir.

Q. Well what is there about the writing of the Yost machine that enables you to say that none of these ordinances except the two levying ordinances were written on the Yost machine?

Counsel for the defendant objects to the question asked the witness on the ground that it is not competent, relevant or material to any of the issues in this case, and because the witness has not been shown to be qualified to testify as an expert regarding the matters concerning which he is interrogated.

A. Well I don't know that I can describe it exactly, but with the Yost the impression is not printed with a ribbon, or through a ribbon.

Q. Then they don't use a ribbon on a Yost machine?

A. No sir. It is or has more the appearance of printed matter, than the others have.

Q. Take the witness.

By Mr. JONES: "Counsel for the defendant moves the court to strike out the testimony of the witness for the reason that it is immaterial to any issue in this case, and because the questions
748 are leading and assuming matters as facts that are not proven or in evidence, and for the reason that the papers and instruments enquired about have not been introduced in evidence, and not otherwise properly or sufficiently identified."

Q. That is all.

H. LYON WHITE.

Sworn to before me, on the day, within the hours and at the place in that behalf first aforesaid, and subscribed in my presence this 15th day of September 1900.

[SEAL.] JOHN M. ORR,
Notary Public, Jackson County, Missouri.

W. C. MOORE, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith,—

Direct examination by Mr. FIELD:

Q. State your name?
A. W. C. Moore.
Q. Mr. Moore I believe you are a deputy in the office of the city clerk of Kansas City, Missouri?
A. I am a clerk in the office of the city clerk.
Q. Did you bring these papers from the city clerk's office, that I have shown these three witnesses that have preceded you?
A. Yes sir.
Q. They are in his office and custody are they not?
A. Yes sir.
Q. Are you familiar with type-writing?
A. Yes sir. Somewhat.
Q. Do you run a type-writing machine yourself?
A. Yes sir.
Q. How long have you been doing type-writing work?
A. Four or five years.
Q. Is this type-writing machine that used to be in the office of the city clerk of Westport in your office now?
A. Yes sir.
Q. Kansas City being successor to Westport succeeded to that machine?
A. Yes sir.
Q. Now I will ask you whether in your judgment the resolutions and ordinances that I have shown these witnessess who pre-
749 ceded you,—that is the two levying ordinances were written on the Yost machine?

Counsel for the defendant objects to the question asked the witness on the ground that it is not material or relevant to any of the issues in this case, and for the reason that the papers enquired about have not been introduced in evidence or otherwise sufficiently identified, and also for the reason that the witness has not been shown to be qualified to express an opinion of any value regarding the matters concerning which he is now being interrogated."

A. I don't think any of the ordinances shown me were written on the Yost machine with the exception of these two levying ordinances.
Q. You mean the two that Dr. Love says were actually written on the Yost machine?
A. Yes sir.

Q. And you think all the others were written on some other and different kind of a machine?
A. Yes sir.
Q. Did you say you have been familiar with type-written work?
A. Yes sir.
Q. With different machines?
A. Well I have never used but two machines the Remington and the Yost,—these are the only ones that I have used personally. I have seen a good deal of work though from other machines.
Q. The Yost machine I believe does not use a ribbon?
A. No sir.
Q. That is the only difference?
A. Well yes, that is the only machine that I know of that does not use a ribbon.
Q. Take the witness.

By Mr. JONES: "Defendant moves the court to strike out all of the evidence of this witness for the reason that it is immaterial and irrelevant to any of the issues in this case, and for the reason that the witness has not been properly qualified to give expert testimony regarding the matters concerning which he has been interrogated, and because the matters regarding which he was interrogated is not a proper matter of expert testimony."

Q. That is all.

W. C. MOORE.

750 Sworn to before me, on the day, within the hours and at the place in that behalf first aforesaid, and subscribed in my presence this 17 day of Sept. 1900.

JOHN M. ORR,
Notary Public, Jackson County, Missouri.

UNITED STATES OF AMERICA, } ss:
State of Missouri, County of Jackson, }

I, John M. Orr, a notary public within and for the county of Jackson in the State of Missouri, do hereby certify that pursuant to an agreement and stipulation in that behalf entered into in my presence by and between the parties in the above entitled action, represented as aforesaid, whereby it was agreed and stipulated that formal notice of the taking of the depositions herein was waived, there appeared before me at the office of R. H. Field in the New York Life building in Kansas City, Jackson county, Missouri, on the 7th day of August 1900 and continued from that day thereafter on the various days hereinbefore set forth, to wit,—August 8th, 13th and 14th 1900,—Arthur M. Allen, Jr.; Henry A. Wise, George S. Graham, R. B. Middlebrook, A. S. Marley, George L. Love, A. H. Benson, H. L. White and W. C. Moore, who were each duly and severally sworn to testify to the truth, the whole truth and nothing but the truth of their knowledge of and touching the matter in controversy aforesaid; that their said depositions respectively were written down

by me in short hand pursuant to an agreement and stipulation entered into in my presence in that behalf, that I transcribed my said short hand notes of the depositions of each of said witnesses, and each of said witnesses subscribed same in my presence as appears by the certificate to the signatures of each of said witnesses hereinbefore set forth, and their said depositions are now herewith returned.

In witness whereof I have hereunto set my hand and affixed my official seal this 30 day of October 1900.

My commission as notary public will expire January 14th 1901.

[SEAL.] JOHN M. ORR,
Notary Public, Jackson County, Missouri.

Notary's fees $78.00.

751 In the Circuit Court of the United States, Western District of Missouri.

RICHARD H. FIELD
vs.
THE BARBER ASPHALT PAVING COMPANY. } No. 2407. Equity.

R. H. Field, for complainant.
Scarritt & Scarritt, for defendant.

Views of the Trial Judge.

Not being able to announce my views in the presence of counsel, I reduce my conclusions to writing, that they may be advised, and a decree accordingly prepared.

This case is one in equity to cancel certain alleged tax bills, which defendant asserts, are liens on plaintiff's real estate. Under the Missouri statutes plaintiff, in or out of possession, by proceedings in equity can remove any wrongful cloud upon his title and this court may follow such procedure.

Complainant is the owner of certain lots facing on three streets in the city of Westport, State of Missouri, which December 2, 1897, on due proceedings, was merged in, and became part of Kansas City.

Excepting as to one matter to be presently noticed, this date is not material, because all things done, which are *now* the subject of controversy, were done prior to that date, and when Westport was an independent and separate municipality.

The jurisdiction of this court is challenged, on the ground than an amount less than two thousand dollars is in controversy.

752 This contention arises on the following facts: The complainant R. H. Field, owns certain lots and has the legal title thereto in front of which, paving was done. The tax bills for paving in front of those lots, amount to less than two thousand dollars. But complainant has an equitable ownership, at least in certain other

lots. The title was taken in another, as a mere convenience, and a declaration of trust executed in favor of plaintiff as to those lots. Why complainant is not liable for those taxes I do not understand, and why he is not interested in clearing those lots of an alleged illegal tax, has not been made to appear to me. Adding those tax bills to the others, all held by defendant, and the jurisdictional sum is in controversy.

The paving was done on three streets in Westport, under certain resolutions and ordinances of Westport, and contracts between that city and the defendant company. The paving and work was done, and the tax bills made out and signed by the proper officer prior to December 2, 1897, on which day by a general election, the town became a part of Kansas City. But the complainant insists that because the tax bills had not then been registered in the books of the city, and of course not delivered, that such registry and delivery could not subsequently be made.

I am content to state that in my judgment the statute is directory, and in no event could the failure of the city clerk to register the tax bills, defeat the defendant and deprive it of compensation for labor and material, if otherwise it would be entitled to such compensation. Such technicalities ought not defeat substantial rights.

And it is urged that the three streets, or some of them had not been brought to the established grade, and that for grad-
753 ing the streets, tax bills could not be issued as against the adjacent lots. And such seems to be the law. But the evidence shows, that the matter of grading, was but little more, if any, than what was required as part of the paving; that is evening the surface, and putting it in proper condition. And at all events, there was no extra expense or charge for the so called grading. I therefore conclude that this contention is without merit.

Section 95 of the Laws of 1895 Statutes of Missouri, under which the proceedings in question were had, in substance provide-, that the resolution for paving can be defeated or nullified by a protest filed by a majority of the *resident* owners liable to be taxed on account of such improvement. And by implication at least the non-resident owner cannot protest. Complainant was a resident of Kansas City, and therefore a non-resident of Westport. And he urges that this was an unjust and arbitrary discrimination in favor of a resident and against him and other non-resident owners, for the reason that resident owners by protest could defeat the resolution whereas the law would not allow the city officials to receive or recognize the protest from him and other non-resident owners.

It is a well recognized rule, and familiar to all, that parts of a statute may be void, as being in conflict with the constitution and the balance of the statute will stand and be enforced. And it is likewise recognized, that courts will not decide questions that are not practical or necessary for the determination of the case or some phase of the case.

If rights of parties have been trampled upon by reason of this statute, and a property right accorded to a resident of Westport

which is denied to a resident of Kansas City, it would be readily seen that there would be great force in the argument of com-
754 plainant's counsel, that the provisions in question is in conflict with the Federal Constitution. But I fail to find any fact of record in this case that calls for a determination of the question so elaborately argued. It seems to me that the conclusive answer is, that complainant had some knowledge of what was going on and what was being done, and he made no remonstrance and did not file or offer to file a protest, although it may be that he had no actual knowledge until too late to protest. But he had notice the same as residents, to-wit, by publication.

If the resolution or proceeding could be defeated by protest, and if the complainant had the same right to protest, not by the statute, but under the Constitution as a resident owner had, then why did he not protest or offer to protest? And must he not do that or offer to do that which was required of a resident, before he can claim that he is denied equal protection? It seems clearly so to me and a discussion of, or deciding the question is wholly academic.

The evidence in this case is voluminous, and I have read and studied it with care, because of the charges of fraud in the procurement of the contract. When the board of aldermen were acting in this matter, I believe and so hold, that it was not acting in a legislative capacity, but was acting in an administrative or business capacity. And this being so the charge of corrupting influence, demands consideration.

The charge generally speaking is, that one McGowan, a long time an active politician of Kansas City, and of the county, was the active agent of defendant, receiving his compensation quite likely in the shape of commissions, and the more contracts, the larger his receipts for his work. His method was to procure the signature of resident owners, asking for the paving of the streets, which he did for a double purpose. The one was to give a moral backing
755 to the aldermen who would then say they were merely carrying out the will of the people. The other purpose was to forestall the protests which might otherwise be made, and thereby defeat the scheme. That such were his purposes, I have no doubt. And that he was very active I have no doubt. It is alleged in the bill that in order to obtain these signatures, that McGowan, offered rebates on the special tax bills of such signers thus obtained. If this be so, it would be bribery and corruption, as fully as if money were paid directly to prevent protests, and in my judgment ought to and would defeat the special tax bills. Corruption such as bribery will not defeat legislative action, yet the action of aldermen and of others necessarily connected therewith in a business or administrative transaction, would be defeated by a showing of knavery like that charged. And if the proofs were present, I would not for a moment hesitate to so decide. It is within the knowledge of all, that there is no other burden so great, as that of municipal government, and no other matter calling for closer scrutiny than the administrative affairs of municipal government.

The conclusions I have reached, are not entirely satisfactory to myself, but they are the more nearly so, than if I were to find otherwise. The agent McGowan as already stated, was active in working up these contracts, and while the proofs do not show it, was I assume working on a commission. He no doubt importuned the resident property owners to sign his petitions. The board of aldermen, as it seems to me, was swift to pass the resolutions and make the contracts, for paving those three streets, connecting the two cities, which streets were but a block from a street to another, and all parallel streets; with but very few buildings thereon. That the action of the aldermen was very oppressive to the property owners, and particularly to those non-resident, need only be stated, as there is prac-
756 tically no evidence to the contrary. But the fact that the alderman acted oppressively does not show bribery, or other corruption. And I have searched the record, and find no evidence of corruption. The whole story is, that McGowan worked for and obtained the contracts, pressing the people with the supposed advantages that paving would be, and then pressing upon the aldermen that the will of the people must be carried out. But I fail to find evidence that there was any sharing of the profits with any of the aldermen, or of receiving by or offering of rebates to any of the property owners. There is evidence that the attorney for the defendant company prepared the resolutions and ordinances. I see nothing wrong in this for my experience and observation have been, that contractors with municipalities either insist upon having their own attorneys do such work or at least work in conjunction with the solicitor for the city, to the end that there will be a contract, upon which a recovery can be had, or the bonds floated when the contractor has done his work.

That there were some irregularities in the adoption of the resolutions and ordinances, and in making the contract, is apparent. But without discussing them, it is enough to say, that these defects were not substantial. Complainant resided near by had some knowledge of what was going on by publication if not actual notice and made no protest, and ought not be allowed to have the paving and escape payment by proceeding in equity on the grounds above referred to.

The evidence shows that the contracts called for "Lake Trinidad asphalt." There is evidence tending to show, that good asphalt and quite as good as Trinidad, can be obtained from Bermuda, Mexico, and from places in the United States. On such facts it is contended that the city had no right to limit the contract to Trinidad, and that in so doing the commerce clause of the Constitution was vio-
757 lated and that the Federal anti-trust statutes were likewise violated. And this argument is emphasized by complainant's counsel, because as he contends, that the defendant has a monopoly of Trinidad asphalt. The evidence does not show this to be so. But if it does have the monopoly, I do not believe the point is well taken. An individual certainly has the right in the erection of an improvement, to get that which he believes the best, and that which he pre-

fers, regardless of the reason. And he should not defeat a recovery by showing that in fact something else was as good or better, or that the vendor had a monopoly. And why should not the same holding be made as to a city?

Can it be so, that because the city concludes, although wrongly, that Trinidad is the best asphalt, that its contract must be cancelled, on a showing that the Trinidad is not the best, and that it is the subject of a monopoly?

Why limit the evidence to other asphalts? Why not receive evidence as to brick or other paving? I think this matter was in the province of the city to determine, and that the courts have no right to review it. Other objections are made, such as alleged violations of the State constitution, and a failure to observe the State statutes, which I feel that I need not present in detail, believing that they are without merit. But there is an objection to part of the paving, which is not one of irregularity, but an objection calling for special consideration, and a ruling thereon. The claim is made as to part of the paving, that it was unnecessary, and unreasonable, because the streets had recently been paved with other material, as yet but little worn, and which was substantial and sufficient for all practical purposes, and that this former paving had been done at the expense of the adjacent property owners. That a city council can pave
758 its streets, on due proceedings, is conceded by all. But when this power has been exercised, and the streets paved, and the expense thereof taxed up against the adjacent property owners, and they have paved the same, when may the city council again have the street paved? I concede that if it is doubtful whether the former paving is still suitable, that the judgment of the city authorities to re-pave should not be ridden down by the courts.

But can the city council one year macadam the streets and the next year with new officers, pave with brick, and the next year with asphalt, all at the expense of the adjacent property owners, merely to suit the whims or supposed taste of the yearly change of city officers? Must not such oppression which amounts to confiscation be controlled by the courts? Can such matters be under the exclusive control and jurisdiction of the officers of the city? I am clearly of the opinion that the courts should and must interfere, if the streets are already covered by a substantial paving.

The evidence shows the following: Wyandotte street, one of the streets in question was paved with macadam in the year 1892 or 1893, four or five years before the asphalting in question. To all practical purposes the parts of the street in question, was in the country with but few houses, and quite a distance from any place that could be called a city, or part of a city, other than by name. There were no sidewalks. The macadam was about twelve inches thick, and when swept off was all right and in good condition. It was but very little worn, and good for many years' service. It had been put down by municipal authority and assessed up and against the adjacent property, and special tax bills had been iss-ed therefor and paid for by the owners of the adjacent property. It therefore

seems to me, and I so hold, that the repaving could not be
759 lawfully done solely because the municipal authorities within the four years had changed their minds as to the materials for paving, and that as a matter of taste, asphalt to them seemed the better, or smoother, or the more beautiful.

These suggestions do not apply at all to Baltimore street and only in a measure to Main street.

The decree in this case will afford the complainant the relief prayed for as to Wyandotte street, and the relief prayed for will be denied as to the other two streets, each party paying half the costs.

(Signed) SMITH McPHERSON,
Trial Judge.

Kansas City, Missouri, July 15th, 1902.

[Endorsed:] 2407. Opinion comp.

760 UNITED STATES OF AMERICA, *sct:*

I, Adelaide Utter, clerk of the circuit court of the United States, for the western division of the western district of Missouri, do hereby certify that the above and foregoing is a true copy of the record proof, assignments of errors and all proceedings in the cause entitled Richard H. Field, complainant, against The Barber Asphalt Paving Company, defendant, as fully as the same remains on file and of record in my office.

Witness my hand as clerk and the seal of said court.

Done at office in Kansas City, Missouri, this 12th day of January, A. D. 1903.

{Seal United States Circuit Court, Western Division of the Western District of Missouri.}

ADELAIDE UTTER, *Clerk.*

761 In the Supreme Court of the United States.

RICHARD H. FIELD, Appellant,
vs.
THE BARBER ASPHALT PAVING CO. } No. 18797.

Statement of the Errors on which Appellant, Richard H. Field, Intends to Rely, and of the Parts of the Record which He thinks Necessary for the Consideration thereof.

Comes Richard H. Field appellant, in the above cause, who was complainant in the cause in the trial court wherein the judgment and decree appealed from was rendered, and availing himself of the provisions of section 9 of rule 10, of the Supreme Court of the United States, governing the printing of the record in cases pending on appeal therein, now makes as his statement of the errors of the trial court on which he intends to rely, and as the parts of the record

which he thinks necessary for the consideration thereof, the following:

762 *Statement of Errors.*

1. The court erred in adjudging and decreeing valid and binding on complainant and his property "the certificates" (special tax bills) issued to defendant for the paving of Main street in question, for the reasons hereinafter assigned and stated against the validity thereof.

2. The court erred in adjudging and decreeing valid and binding on complainant and his property "the certificates" (special tax bills) issued to defendant for the paving of Baltimore avenue in question, for the reasons hereinafter assigned and stated against the validity thereof.

3. The court erred in ordering and decreeing that the complainant have and recover no relief as to the Main Street special tax bills described in his bill filed in this cause, for the reasons hereinafter assigned and stated against the validity thereof.

4. The court erred in ordering and decreeing that the complainant have and recover no relief as to the Baltimore Avenue special tax bills described in his bill filed in this cause, for the reasons hereinafter assigned and stated against the validity thereof.

5. The court erred in ordering and decreeing that the complainant's bill be dismissed as to the Main Street special tax bills described in his bill filed in this cause, for the reasons hereinafter assigned and stated against the validity thereof.

6. The court erred in ordering and decreeing that the complainant's bill be dismissed as to the Baltimore Avenue special tax bills described in his bill filed in this cause, for the reasons hereinafter assigned and stated against the validity thereof.

7. The court erred in holding that sections 88 to 95, inclusive, of the act of the General Assembly of the State of Missouri entitled "An act to repeal article five (5) of chapter thirty (30) of the Revised Statutes of Missouri of 1889, and certain amendments thereto; said article five (5) being entitled 'Cities of the fourth class,' and to enact in lieu thereof a new article providing for the government of cities of the fourth class," approved April 11th, 1895, did not violate section 1 of the 14th amendment to the Constitution of the United States.

8. The court erred in not adjudging and decreeing void, and in not cancelling, the special tax bills in question for the Main Street and Baltimore Avenue paving, because the said sections 88 to 95, inclusive, of the State legislative act aforesaid violated section 1 of the 14th amendment to the Constitution of the United States.

9. The court erred in not adjudging and decreeing void, the special tax bills in question for the Main Street and Baltimore — pave-
763 ments, when, the board of aldermen of the city of Westport, Missouri, in declaring the work on each of these streets necessary to be done, in ordering it done, and in contracting with

the defendant therefor, in the manner hereinafter noted, deprived the complainant of his rights of property guaranteed in section 1 of the 14th amendment to the Constitution of the United States.

10. The court erred in not adjudging and decreeing void, the special tax bills described in the "fifth" charge of complainant's bill as issued to defendant against lots one (1) to five (5), inclusive, in block No. 45, for the asphalt pavement in question on Main street, when the uncontradicted testimony shows that preceding this pavement, to-wit, in 1891 or 1892, the city of Westport macadamized that part of said Main street from 39th street to Westport avenue and assessed the cost thereof to the said lots in said block No. 45 and other lands abutting on that part of said Main street, and when the uncontradicted testimony further shows that in 1897, when the asphalt pavement in question on Main street from 31st street to Westport avenue was ordered laid and contracted for, the said macadam pavement in that block of Main street, to-wit, from 39th street to Westport avenue was a good and substantial pavement and in no need of repair or of being replaced by another pavement for the public use or for safe and convenient travel thereon, unlike the other part of the said Main street, to-wit, from 39th street to 31st street, which was then out of repair and which had not been paved or macadamized, at the cost of the lands abutting thereon before the asphalt pavement in question laid thereon by defendant in 1897.

11. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving in question on Main street, when, as alleged by complainant and shown by the uncontradicted proofs in the cause, said pavement was not done nor declared necessary to be done by the board of aldermen of the city of Westport because deemed by said board necessary to be done, but because of the lobbying and undue influence of the defendant't agents with said board of aldermen and with the residents of said city owning lands fronting on that part of Main street.

12. The court erred in not adjudging and decreeing void the special tax bills in question issued to defendant for the paving in question on Baltimore avenue, when, as alleged by complainant and shown by the uncontradicted proofs in the cause, said paving was not done nor declared necessary to be done by the board of aldermen of the city of Westport because deemed by said board necessary to be done, but because of the lobbying and undue influence of the defendant's agents with the said board of aldermen and with the residents of said city owning lands fronting on that part of Baltimore avenue.

13. The court errrd in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Main street, when the uncontradicted proof in the cause shows that the board of aldermen of the city of Westport, Missouri, did not declare the work on said Main street necessary to be done nor afterwards pass the ordinance ordering such work to be done nor cont-act with the defendant therefor, because the said work was

764 deemed by said board necessary to be done, but did so because of the previous uniform custom and course of dealing with the defendant, that the said board of aldermen would and did declare it necessary to pave and order paved any street in said city, with "a genuine Trinidad Lake asphalt" whenever the agents of defendant procured and presented to said board, a petition signed by a majority of the residents of said Westport owning lands fronting on the proposed street pavement, asking said board to do so.

14. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Baltimore avenue, when, the uncontradicted proof in the cause shows, that the board of aldermen of the city of Westport, Missouri, did not declare the work on said Baltimore avenue necessary to be done nor afterwards pass the ordinance ordering such work to be done, nor contract with the defendant therefor, because the said work was deemed by said board necessary to be done, but, did so because of the previous uniform custom and course of dealing with the defendant that the said board of aldermen would and did declare it necessary to pave and order paved any street in said city, with "a genuine Trinidad Lake asphalt," whenever the agents of defendant procured and presented to said board, a petition signed by a majority of the residents of said Westport owning lands fronting on the proposed street pavement, asking said board to do so.

15. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Main street and for the paving done on Baltimore avenue, when, complainant's bill alleges and the proof in the cause shows, that the defendant had the exclusive control of the importation, sale and use of the "Trinidad Lake asphalt" in and to said city of Westport at the times of the specifications of the same by the city of Westport, Missouri, for use in the said street improvements.

16. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Main street, because the written contract therefor, between the city of Westport and the defendant required, that the asphalt used in said street pavement should be "refined Trinidad Lake asphaltum" and excluded the asphalt of other foreign countries and the asphalt of our own States from the market for use, and from being used, in said street pavement, in restraint of trade and commerce among the several States and with foreign nations, contrary to section 1 of the act of Congress of the United States, approved July 2nd, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies."

17. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving on Baltimore avenue, because the written contract therefor, between the city of Westport and the defendant required, that the asphalt used in said street pavement should be "refined Trinidad Lake asphaltum" and excluded the asphalt of other foregn countries and the asphalt of our own States from the market for use, and from

being used, in said street pavement, in restraint of trade and
765 commerce among the several States and with foreign nations, contrary to section 1 of the act of Congress of the United States approved July 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

18. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Main street, when, the uncontradicted proof in the cause shows that the resolution and ordinances of the board of aldermen of said city of Westport under which said work was done, were in restraint of trade and commerce among the several States and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri, and violated section 1 and section 3 of the act of Congress of the United States, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," approved July 2nd, 1890.

19. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Baltimore avenue, when the uncontradicted proof in the cause shows, that the resolution and ordinances of the board of aldermen of said city of Westport, under which said work was done, were in restrainst of trade and commerce among the several States and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri, and violated section 1 and section 3 of the act of Congress of the United States, entitled, "An act to protect trade and commerce against unlawful restraint and monopolies," approved July 2nd, 1890.

20. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving on Main street, when, the proof in the cause shows, that the designation and specification in the resolution, ordinances, and contract that the asphalt used in said Main Street pavement should be "genuine Trinidad Lake asphalt," was due to a conspiracy and combination between the defendant, the city engineer, and board of aldermen of the said city of Westport and others, in restraint of trade and commerce among the several States and with foreign nations, and in restraint of trade and commerce with the Indian Territory of the United States and the State of Missouri, contrary to section 1 and section 3 of the act of Congress of the United States, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2nd, 1890.

21. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving on Baltimore avenue, when, the proof in the cause shows, that the designation and specification in the resolution, ordinances, and contract that the asphalt used in said Baltimore Avenue pavement should be "genuine Trinidad Lake asphalt," was due to a conspiracy and combination between the defendant, the city engineer, and board of aldermen of said city of Westport, and others, in restraint of trade and commerce among the several States and with foreign

nations and in restraint of trade and commerce with the Indian Territory of the United States and the State of Missouri, contrary to section 1 and section 3 of the act of Congress of the United States, entitled, "An act to protect trade and commerce against un-
766 lawful restraints and monopolies," approved July 2nd, 1890.

22. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Main street, when the uncontradicted proof shows that the defendant obtained the contract for said street pavement by monopolizing, by attempting to monopolize, by conspiring and by combining with other persons to monopolize, the importation and the sale and use of Trinidad Lake asphalt in the city of Westport, Missouri, all in violation of section 2 of the act of Congress of July 2nd, 1890, aforesaid.

23. The court erred in not adjudging and decreeing void, the special tax bills in question issued to defendant for the paving done on Baltimore avenue, when the uncontradicted proof shows that the defendant obtained the contract for said street pavement by monopolizing, by attempting to monopolize, by conspiring and by combining with other persons to monopolize, the importation and the sale and use of Trinidad Lake asphalt in the city of Westport, Missouri, all in violation of section 2 of the act of Congress of July 2nd, 1890, aforesaid.

24. The court erred in not adjudging and decreeing void, the special tax bills for the Main Street pavement in question, when the resolution No. 540 of the board of aldermen of the city of Westport, declaring said street pavement to be necessary, provided that the pavement should consist of "a genuine Trinidad Lake asphalt pavement" and excluded from the market for use, and from being ordered or allowed to be used, in said street pavement, the asphalt of other foreign countries and of the United States and violated the commerce clause in section 8 of article I, of the Constitution of the United States.

25. The court erred in not adjudging and decreeing void, the special tax bills for the Baltimore Avenue pavement in question, when the resolution No. 570 of the board of aldermen of the city of Westport, declaring said street pavement to be necessary, provided that the pavement should consist of a "genuine Trinidad Lake asphalt pavement" and excluded from the market for use, and from being ordered or allowed to be used in said street pavement, the asphalt of other foreign countries and of the United States and violated the commerce clause in section 8, of article I, of the Constitution of the United States.

26. The court erred in not adjudging and decreeing void, the special tax bills for the Main Street pavement in question, when the ordinance No. 1803 of the board of aldermen of the city of Westport, ordering said street pavement, provided that the pavement should consist of "a genuine Trinidad Lake asphalt," and excluded from the market and from being contracted for use, and from being used, in said street pavement, the asphalt of other foreign countries

and of the United States, and violated the commerce clause in section 8, of article I, of the Constitution of the United States.

27. The court erred in not adjudging and decreeing void, the special tax bills for the Baltimore Avenue pavement in question,
767 when the ordinance No. 1866 of the board of aldermen of the city of Westport, ordering said street pavement, provided that the pavement should consist of "a genuine Trinidad Lake asphalt pavement," and excluded from the market and from being contracted for use, and from being used, in said street pavement, the asphalt of other foreign countries and of the United States, and violated the commerce clause in section 8, of article I, of the Constitution of the United States.

Statement of the Parts of the Record which Richard H. Field, Appellant, Thinks Necessary to be Printed for the Consideration of the Errors Aforesaid.

(The pages hereinafter appearing are references to the transcript filed.)

1. The complainant's bill in equity, (pages 1 to 15) excepting and omitting the following parts, thereof, to-wit: The last paragraph of the "fifth" charge referring to the non-delivery of the special tax bills, etc.; also charge "seventh" in said bill; also charge "eighth" including the amendments therein; also the interrogatories in the prayer in said bill in equity and all reference to said interrogatories therein; also the note appended to the end of said bill referring to said interrogatories.

2. The recital of filing answer. (Pages 15 and 18.)

3. The answer filed by defendant to complainant's bill in equity, (pages 16 to 27) excepting and omitting the last three lines of page 22, all of page 23 and the first seventeen lines of page 24; also omitting the answers to interrogatories in bill, following the defendant's answer. (Pages 27 to 32 inclusive)

4. The recital of filing replication. (Page 32.)

5. The replication filed by complainant to defendant's answer. (Page 32.)

6. The order of the court of June 4th, 1900, extending time for the taking of depositions on all the issues in the case, (pages 37-38)

7. The complainant's motion for leave to amend "tenth" charge of his bill filed on the 16th day of June, 1900. (Pages 38 to 13th line of page 40 inclusive.)

8. Order of the court on said motion made on the 11th day of July, 1900, and extending time to take depositions. (Pages 43 and 44.)

9. The amendment filed by the complainant to the "tenth" charge of his bill on the 13th day of July, 1900, on the order of the court aforesaid. (Pages 44 and 45.)

768 10. The opinion of the trial judge filed in the cause. (Pages 751 to 759.)

11. The judgment and decree of the court. (Pages 46 to 50.)

12. Petition, (pages 60 and 61) assignment of errors, (pages 50 to 59) and bond (page 69) filed by complainant for appeal of the cause.

13. Order of the court reciting complainant's filing of petition, assignment of errors, and bond for appeal, and the court's approval of the appeal bond and allowance of the appeal of the complainant. (Pages 66, 67 and 68.)

14. Recital of the offer of evidence. (First two lines on page 71.)

Of Complainant's Witnesses and Evidence.

J. K. Griffith: The last 21 lines.....on page 72
First 6 lines.....of " 73
Question 7 and the answer thereto.....on " 73
Questions 3 to 7 inclusive *in* answers thereto..... " " 74
Questions 2 and 3 and the answers thererto ..... " " 76
Questions 4 to 7 inclusive and the answers thereto ..... " 77
Question 11 and the answer thererto..... " " "
Questions 3 to 7 inclusive and the answers thereto..... " 79
Questions 3 to 9 inclusive and the answers thereto..... " 80
All of page.....81
" 82

769 Question 5 and what follows to last word inclusive.....on page 84
Questions 5 to 9 inclusive and the answers thereto..... " " 85
Last question and answer..... " " 93
First question and answer..... " " 94
Dr. George L. Love: Lines 13 to 25 inclusive..... " " 96
Last 7 lines..... " " 99
First 7 lines..... " " 100
Last question and answer..... " " "
Line 11 and following lines to last line inclusive..... " " 101
All of " 102
First 9 lines inclusive..... " " 103
Questions 5 and 6 and the answers thereto..... " " "
Last 2 questions and answers..... " " 104
All of page 105
" " " 106
" " " 107
First 7 lines.....on " 108
First 2 questions and answers in cross examination... " " "
Line 22..... " " 119
Question 6 to last inclusive and answers thereto..... " " 122
All except last 4 lines..... " " 123
All except last 6 lines..... " " 124
First 8 lines..... " " 127
Line 22 and last line ..... " " "
All of page 128
Lines 1 to 19 inclusive..... " " 129

770 John C. Tate: Last 8 lines inclusive.....on page 131
First 2 lines.....on page 132
Last 2 lines..... " " 133
Lines 1 to 19 inclusive..... " " 134
Questions 2 and 3 and the answers thereto..... " " 135
Question 11 and the answer thereto..... " " "
Questions 5 to 9 inclusive and the answers thereto..... " " 136
Lines 3 to 6 inclusive..... " " 137
Line 16 to last line inclusive..... " " "
Lines 1 to 27 inclusive..... " " 138
Line 10 to last line inclusive..... " " 139
First 3 lines..... " " 140
Line 14 to last line inclusive..... " " "
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" " 142
First 5 lines..... " " 143
Last 2 lines.....
All of page 144
" " " 145
First 7 lines.....on " 146
Lines 13 to 25 inclusive..... " " 148
Last 5 lines..... " " 149
W. C. Scarritt: Lines 1 to 15 inclusive.....on page 150
Line 14 to last line inclusive..... " " 155
Line 16 to last line inclusive..... " " 159
All of pages 160–161–162–163–164–165 and 166.
771 George L. Love recalled: .....All of pages 167, 168 and 169
Petition for Main Street paving.....page 170
Resolution " " " " ..... " 171
Ordinance " " " " .....page 171–172
Contract—first 47 lines.....on page 173
Line 16 and to last word inclusive..... " " 175
Lines 1 to 51 inclusive..... " " 176
Lines 8, 9, 10 and 11..... " " 178
Lines 15 to 31 inclusive..... " " "
Lines 59 to 68 inclusive..... " " "
Geo. L. Love continuing.....All of page 186
First 13 lines *on*.....on page 187
Lines 5 to 15 inclusive..... " " 188
Lines 2, 3 and 4..... " " 189
Last 10 lines..... " " 190
Lines 10 and 11..... " " 191
Petition for Baltimore for paving.....on page 191–192
Resolution " " " " ..... " " 192
Ordinance " " " " ..... " " 193–194
Contract " " " " ..... " " 194
First 46 lines..... " " 195
Line 25 and the lines following..... " " 197
All of " 198
First 22 lines.....on " 199
Clause No. "12" and the part of clause No.

"14" .....on " 200
772 Lines 1 to 6 inclusive and lines 33 to 42 inclusive .....on page 201
Geo. L. Love continuing. First 5 lines..... " " 207
Last 7 lines..... " " 208
Lines 1, 2 and 3..... " " 209
Line 13 and following to last word inclusive..... " " "
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Petition for Wyandotte Street paving..... .....pages 211-212
Resolution " " " " .....page 212
Ordinance " " " " ..... pages 212-213
Contract.....on page 214
First 23 lines..... " " 215
Last 12 lines..... " " 216
All of " 217
First 5 lines.....on " 218
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Lines 11 to 20 inclusive..... " " 220
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R. H. Field: pages 234 and following pages to 249 inclusive.
Lines 1 to 18 inclusive.....on page 250

Of Defendant's Depositions.

E. H. Phelps: (April 12th, 1900.)
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Lines 18 to 26 inclusive..... " " 298
Lines 2 to 5 inclusive..... " " 299
773 Lines 23 to 29 inclusive.....on page 300
Lines 4 to 6 inclusive ..... " " 301
Lines 19 to 25 inclusive..... " " "
Lines 9 to 22..... " " 302
Lines 19 to 26 inclusive..... " " 304
Lines 1 to 9 inclusive..... " " 305
Last 2 lines..... " " 309
Lines 1, 2, 8, 9, 10 and 11 inclusive..... " " 310
Last 5 lines..... " " 311
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774 Last 7 questions and answers of cross examination ..... on page 350
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E. R. Crutcher: Lines 23 to last line inclusive ..... " " 355
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Last 4 lines ..... " " 362
Lines 1, 2, 10, 11, 12 and 13 ..... " " 363
Last 5 lines ..... " " 364
First 5 lines ..... " " 367
Lines 10 to 16 inclusive ..... " " 369
Line 6 to last line inclusive ..... " " 370
Line 1 to 15 inclusive ..... " " 374
A. D. Beedle: Last line ..... " " 376
Page 375 and first 8 lines ..... " " 380
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Last 3 lines ..... " " 390
Lines 1 to 14 inclusive ..... " " 391
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775 Charles E. Finley: Last 8 lines ..... " " 397
Lines 1 to 7 and lines 23 to 28 inclusive ..... " " 398
Lines 2 to 19 inclusive ..... " " 402
Last 2 lines ..... " " 403
First 17 and last 4 lines ..... " " 404
First 2 lines ..... " " 405
Line 8 and to last line inclusive ..... " " 406
Lines 1 to 19 inclusive ..... " " 407
Lines 4 to 25 inclusive ..... " " 419
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Last 5 lines ..... on page 526
R. H. Field pages 527 and following pages to the end ..... on page 533
Geo. L. Love recalled page 533 and following pages to the end ..... on page 535

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Geo. L. Love recalled June 8th, 1900. Lines 3 to 9 inclusive ..... on page 538
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Patrick Moore, July 12th, 1900: Lines 1 to 26 inclusive..... on page 551
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776 Lines 9 to 13 inclusive ..... on page 560
George L. Love: Line 15 and to last line inclusive..... " " 561
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A. M. Stalnaker: Last 6 lines..... " " 587
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Last 4 lines..... " " 595
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" " " 607
Lines 10 to 28 inclusive..... on " 608

Of Further Depositions Taken by Complainant.

Depositions of J. B. McGowan *et al.* taken Aug. 2nd, 3rd, 4th and 6th, 1900. Pages 613 to 750 inclusive.

RICHARD H. FIELD, *Appellant.*

777 [Endorsed:] File No. 18797. Supreme Court U. S. October term, 1902 Term No. 569 Richard H. Field app't, *vs.* The Barber Asphalt Co. Statement of errors & designation by appellant of parts of record to be printed. Filed April 9th, 1903.

778 In the Supreme Court of the United States.

RICHARD H. FIELD, Appellant,
vs.
THE BARBER ASPHALT PAVING COMPANY. } No. 18797.

Proof of Service upon the Barber Asphalt Paving Company of Copy of Statement of the Errors on which Appellant, Richard H. Field, Intends to Rely, and of the Parts of the Record which He Thinks Necessary for the Consideration Thereof.

STATE OF MISSOURI, } *ss*:
County of Jackson,

Richard H. Field on his oath states: That he is the appellant in the above entitled cause; that on the 11th day of April A. D. 1903, in Kansas City, Missouri, he delivered to W. C. Scarritt, one of the solicitors and counsel for The Barber Asphalt Paving Company, appellee in the above appeal, a copy of the statement of the errors upon which he intends to rely in his appeal in the above cause, and of the parts of the record which he thinks necessary for the consideration thereof, filed by him with the clerk of the Supreme Court of the United States on the 9th day of April, 1903.

RICHARD H. FIELD.

Subscribed and sworn to before me this 11th day of April, 1903. My commission expires Nov. 13, 1906.

[Seal of Alfred Fidler, Notary Public, Jackson County, Missouri.]

ALFRED FIDLER,
Notary Public, Jackson Co., Mo.

779 [Endorsed:] File No. 18,797. Supreme Court U. S. October term, 1902. Term No. 569. Richard H. Field, app't *vs.* The Barber Asphalt Paving Co. Proof of service of statement of errors and designation of appellant. Filed April 14", 1903.

780 In the Supreme Court of the United States.

RICHARD H. FIELD, Appellant,
vs.
BARBER ASPHALT PAVING COMPANY, Respondent.
BARBER ASPHALT PAVING COMPANY, Appellant,
vs.
RICHARD H. FIELD, Respondent. } No. 18798.

To the clerk of the Supreme Court of the United States:

Richard H. Field, the original complainant in the above entitled cause in which there are cross appeals prosecuted both by the com-

plainant and defendant, having served upon the Barber Asphalt Paving Company, the adverse party therein, a statement of the errors on which he intends to rely and the parts of the record which he thinks necessary for the consideration thereof, in response thereto the Barber Asphalt Paving Company does hereby designate in writing additional parts of the record which it deems and thinks material for the determination of the issues involved in said cause on the cross appeals thereof, that is to say:

In addition to the parts of the record designated by the said Richard H. Field as necessary for the consideration of this cause the Barber Asphalt Paving Company designates and thinks necessary for the consideration of this cause, and requests the clerk to print all of the transcript of the record filed in this cause, except the following:

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1. The last paragraph of the fifth charge in the complainant's bill in equity referring to the non-delivery of the special tax bills.
2. All of the seventh charge in said bill.
3. The interrogatories in the prayer in said bill and the note appended to the end of said bill referring to said interrogatories.
4. The answers of defendant to complainant's interrogatories.
5. The entire depositions of the following witnesses: Annie L. Fraser, A. S. Marley, G. L. Carney, E. B. Peck, and A. W. Merrill.
6. The citation and service.

Respectfully submitted,

W. C. SCARRITT,
Counsel for Barber Asphalt Paving Company.

EDWARD L. SCARRITT, *Of Counsel.*

782 [Endorsed:] No. 18798. Richard H. Field *vs.* Barber Asphalt Paving Company. Designation of additional parts of the record material for the determination of this cause by paving company. Scarritt, Griffith & Jones, attorneys at law, American Bank bldg., Kansas City, Mo.

783 [Endorsed:] File No. 18797. Supreme Court U. S. October term, 1903. Term No. 201. Richard H. Field, appellant, *vs.* Barber Asphalt Paving Company. Designation by appellee of additional parts of record necessary to be printed. Filed June 25, 1903.

Endorsed on cover: File No. 18797. W. Missouri C. C. U. S. Term No. 201. Richard H. Field, appellant, *vs.* The Barber Asphalt Paving Company. File No. 18798. Term No. 202. The Barber Asphalt Paving Company, appellant, *vs.* Richard H. Field. Filed January 26, 1903.

[redacted]

[redacted]

[redacted]

[redacted]

MOTION TO DISMISS APPEAL

NOTICE OF MOTION TO DISMISS APPEAL AND BRIEF OF THE APPELLANT IN SUPPORT OF MOTION TO DISMISS APPEAL

[redacted]

RICHARD H. FIELD,
Appellee in Person.

18958

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

BARBER ASPHALT PAVING COMPANY,
Appellant.

vs.

RICHARD H. FIELD,
Appellee.

File No. 18798.
Term No. 202.

MOTION TO DISMISS APPEAL.

Comes the appellee, Richard H. Field, in the above appeal, and moves the honorable court to dismiss the appeal of the Barber Asphalt Paving Company herein, because, he says, this court has no jurisdiction of the same, or to hear and determine the matters sought to be brought before the court by such appeal.

RICHARD H. FIELD,
Appellee in Person.

NOTICE OF MOTION TO DISMISS APPEAL.

To the Barber Asphalt Paving Company, Appellant:

You are hereby notified that Richard H. Field, Appellee in the above named appeal, will, on Monday, the 26th day of October, A. D., 1903, at the meeting of the Supreme Court of the United States on that day, or as soon thereafter as the same can be heard, submit for the consideration of the court the foregoing motion, and the brief thereon hereto attached.

RICHARD H. FIELD,
Appellee.

BRIEF OF THE ARGUMENT.

THE PARTIES.—In the case below the appellee, Richard H. Field, was the complainant, and the appellant, The Barber Asphalt Paving Company, was the defendant. As the complainant, Field, also has an appeal pending in this court (Term No. 201), the respective appeals may be more conveniently referred to as "complainant's appeal, and "defendant's appeal."

NATURE AND OBJECT OF THE SUIT.—On January 4th, 1900, complainant, Richard H. Field, as a resident of Missouri, filed a bill in equity in the United States Circuit Court at Kansas City, Missouri, against the defendant, The Barber Asphalt Paving Company, as a West Virginia private corporation, praying the court to cancel, as clouds on the title to complainant's lands, 17 special tax bills, aggregating, exclusive of interests and costs, the sum of $3,376.45, purporting to have been issued by the city of Westport, as a Missouri fourth-class city, to the defendant paving company for paving done by defendant on Main Street, Baltimore Avenue and Wyandotte Street, three public streets in said city of Westport. (See complainant's bill, printed Record, page 1.)

NOTE: THE FIGURES IN PARENTHESIS, AFTER EACH OF THE PARAGRAPHS HEREINAFTER SET FORTH, ARE THE PAGES OF THE PRINTED RECORD, PREPARED AND FILED IN THIS CASE BY THE CLERK OF THIS COURT.

ALLEGED GROUNDS OF ILLEGALITY OF THE SPECIAL TAX BILLS.—The grounds of illegality of the special tax bills aforesaid, alleged in complainant's bill, were, to state them generally, as follows:

1. That the provisions of the Missouri State legislative act of 1895, conferring power to pave streets at the cost of adjacent lands in cities of the fourth-class, under color of which the tax bills in question were issued, violate Section 1 of the 14th amendment to the constitution of the United States. (Fourth charge of bill, page 2.)

2. That the street pavements in question were unnecessary and were ordered and contracted for by the board of aldermen of Westport because of the lobbying of the agents of defendant and because of the undue and illegal influence of the agents of the defendant over the said board of aldermen. (Sixth charge of bill, pages 3 and 4.)

3. That the defendant had a monopoly of Trinidad Lake Asphalt, the asphalt ordered and required in the pavements in question, and that Trinidad Lake Asphalt was designated in each of the resolutions, ordinances and contracts for the work in question at the instigation of defendant and by arrangement and combination of the board of aldermen of Westport with the view to lessening competition in the importation, etc., of other good and useful brands of asphalt for street paving. (Ninth and tenth charges of bill, page 5.)

4. That the resolutions and ordinances of the board of aldermen for the work in question violate the commerce clause of section 1 of article 8 of the constitution of the United States. (Last clause in complainant's amendment to tenth charge of his bill, page 22.)

5. That the resolutions, ordinances and contracts, and the acts of the defendant and the city authorities of Westport, in securing to the defendant paving company the work in question, violated the anti-trust act of Congress of July 2d, 1890, "to protect trade and commerce against unlawful restraints and monopolies." (Amendment to tenth charge of the bill, page 22.)

OPINION OF THE TRIAL COURT.—The Honorable Smith McPherson, judge of the Federal District Court of Iowa, heard and decided this case at Kansas City. The opinion filed by him in the case shows that the court ruled adversely to the claims of complainant upon the federal questions aforesaid, raised in his bill, and that the only question decided in complainant's favor was as to the necessity for one of the three street pavements in question, to-wit: the pavement on Wyandotte Street. The opinion discloses that it was the view and decision of the trial judge that the pavement laid by the defendant paving company on Wyandotte Street was unnecessary because there was then a good and substantial macadam pavement upon the street, and it was on this ground alone that the special tax bills issued to defendant paving company for the Wyandotte pavement were held void. (Printed Record, page 516, and more particularly page 520.)

It is proper to look at this opinion of the trial court to determine the right to the respective appeals to this court.

Loeb vs. Trustees Columbia Township, 179 U. S., 472, 481.
Egan vs. Hart, 165 U. S., 188.
Robinson vs. Caldwell, 165 U. S., 360.
Murdock vs. Memphis, 20 Wall., 591.

JUDGMENT AND DECREE.—The court, in and by the judgment and decree in this case, adjudged the said special tax bills for the Main Street and Baltimore Avenue pavement valid and binding as liens upon complainant's lands therein described, and dismissed complainant's bill as to said special tax bills for the Main Street and Baltimore Avenue paving, done by the defendant, but in and by the judgment and decree aforesaid, by separate and independent adjudication and order, held and adjudged to be void the special tax bills aforesaid held by defendant for the Wyandotte Street paving aforesaid, done by the defendant, and also adjudged to be void all prior proceedings of the municipal authorities of Westport and the defendant, in and about the said Wyandotte Street pavement, to-wit: (1) Resolution No. 590 of the board of aldermen, declaring the Wyandotte Street pavement necessary, (2) the city ordinance, No. 1931, ordering the work, (3) the contract with the defendant for the Wyandotte Street pavement, (4) the ordinance, No. 2047, levying special tax and assessment for the Wyandotte Street pavement; and (5) the court canceled the said special tax bills for the Wyandotte Street pavement and granted to complainant all of the relief prayed for in his bill as to the said special tax bills for the Wyandotte Street pavement aforesaid done by defendant. (Pages 23 and 24.)

TERM OF COURT AND DATE OF DECREE.—This decree was entered on Friday, October 10th, 1902, at the regular April term of the said court. (Page 22.)

APPEALS.—At the ensuing term of the court, to-wit: at the November term, on the 18th day of December, 1902, complainant and defendant respectively filed

assignment of errors and petition for appeal to the Supreme Court of the United States, which appeals were allowed. (Page 35.)

COMPLAINANT'S ASSIGNMENT OF ERRORS.—The complainant's assignment of errors was, that the court had erred in each of the adverse rulings and decisions of the court aforesaid, including the adverse decision of the court on the 14th amendment and commerce clause of section 8 of article 1 of the constitution of the United States, and in its construction of the anti-trust act of Congress, and that the court had erred in adjudging and decreeing the special tax bills for the Main Street and Baltimore Avenue paving valid and binding liens upon complainant's lands therein described. and in dismissing complainant's bill as to said special tax bills for the Main Street and Baltimore Avenue paving done by the defendant, and upon this part of the judgment and decree as to the Main Street and Baltimore Avenue special tax bills only, were errors assigned by the complainant.

(See complainant's assignment of errors, pages 25 to 31.)

(See complainant's petition for appeal, page 31.)

DEFENDANT'S ASSIGNMENT OF ERRORS.—The defendant's appeal presents no question upon the constitution of the United States. The assignment of errors filed by the defendant, in substance, assigned only two errors of the court in the judgment and decree in question, as follows:

First. (No. "1," first to eighth inclusive.) That the court erred in holding that the Wyandotte Street pavement was unnecessary and that the proceedings therefor, to-wit: the resolution, or-

dinance and contract for the repavement of Wyandotte Street with asphalt, in the fall of 1897, were unnecessary and unreasonable, and that such proceedings and the special tax bills issued thereon to defendant for the Wyandotte Street pavement were unauthorized and void.

Second. (No. II.) That the judgment and decree against the defendant in so far as it adjudges and decrees that the said Circuit Court had jurisdiction of this suit, and that the amount in dispute is not less than $2,000.00 is erroneous.

And defendant's appeal is in terms limited to these questions.

(Defendant's assignment of errors, page 32.)

(Defendant's petition for appeal, page 35.)

(Order allowing the appeals, page 35.)

POINTS AND AUTHORITIES.

I.

The Supreme Court has no jurisdiction of the defendant's appeal upon the question of jurisdiction of the Circuit Court, raised in error numbered "II" in defendant's assignment of errors, for the following reasons:

1. Because such question of jurisdiction is not certified to the Supreme Court from the court below.

Colvin vs. Jacksonville, 157 U. S., 368.
Chappel vs. U. S., 160 U. S., 499, and cases cited.
Huntington vs. Laidley, 176 U. S., 668 and 676.
The Bayonne, 159 U. S., 687.
Ansbro vs. United States, Id., 695.

2. Because the question of jurisdiction of the lower court is not *the only question* involved in defendant's appeal. Both the question of jurisdiction and the question of the correctness of the adverse decision of the court on the merits of the controversy, as to the necessity of the pavement of Wyandotte Street, the validity of the resolution or ordinace and contract for the work and of the special tax bills therefor, are in the errors assigned and brought up by defendant's appeal to this court. Such appeal should have been

taken to the United States Circuit Court of Appeals, and having been erroneously taken to this court, should be dismissed.

Van Wagenen vs. Sewall, 160 U. S., 373.
Chappel vs. U. S., 160 U. S., 499.
Robinson vs. Caldwell, 165 U. S., 360 and 361.
Arkansas vs. Schlierholz, 179 U. S., 600 and 601.
Merritt vs. Bowdoin College, 169 U. S., 551.
Mexican Central Ry. Co. vs. Eckenan, 187 U. S., 429.

3. The terms of the court at Kansas City, as prescribed by act of Congress, are April and November terms.

26 U. S. Stat. 369, and 27 U. S. Stat. 20.

Defendant's appeal to this court, on the question of jurisdiction, was too late. The judgment was rendered October 10th, 1902. This was at the April term of the Circuit Court (Page 22). The defendant's appeal was taken and allowed December 18, 1902, at the November term of the court (page 35). The appeal to the court, on the question of jurisdiction, was, therefore, out of time and should therefore be dismissed.

Calvin vs. City of Jacksonville, 158 U. S., 456.
Merritt vs. Bowdoin College, 169 U. S., 556.
The Bayonne, 159 U. S., 687.

When the April term of the court ended, the term at which the decree in question was rendered, the right of the defendant to a direct appeal to the Supreme

Court of the United States on the question of jurisdiction also ended. The defendant's right of appeal after that, and on the date its appeal was taken, was only to the Circuit Court of Appeals.

(See in point *Reed vs. Stanley*, 97 Fed. Rep., 521.)

4. Defendant's appeal to this court cannot be sustained because of the questions raised by the complainant upon the constitution of the United States, as aforesaid, these questions were all decided in favor of the defendant. It is only the unsuccessful party on the issue as to the constitutionality of a State law, who has a direct appeal to the Supreme Court of the United States.

Loeb vs. Columbia Township, 179 U. S., 472.
New Orleans vs. Emsheimer, 181 U. S., 153.
Muse vs. Arlington Hotel Co., 168 U. S., 430.

5. "Cross appeals in equity must be prosecuted like other appeals."

Farrar vs. Churchill, 135 U. S., 609.

See also *Hilton vs. Dickinson*, 108 U. S., 165.

The S. S. Osbourne, 105 U. S., 447.

This was said and held as to the time and manner for taking appeals from Circuit Court judgments prescribed in other existing provisions of Congress. It would seem only a fair corollary to hold that the appellate jurisdiction of a cross appeal must be determined the same as if a sole appeal.

II.

THE APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS, AND MUST BE, AS PRESCRIBED BY ACT OF CONGRESS. DEFENDANT'S RIGHT OF APPEAL, AS PRESCRIBED BY ACT OF CONGRESS, WAS TO THE CIRCUIT COURT OF APPEALS. THE APPELLATE JURISDICTION OF THAT COURT WAS NOT CONTROLLED, NOR CHANGED TO THE SUPREME COURT OF THE UNITED STATES, BY THE COMPLAINANT'S RIGHT OF APPEAL, NOR BY HIS APPEAL, TO THIS COURT.

Defendant's appeal to this court amounts to an assertion that this court has a remnant of appellate jurisdiction, not specified by Congress. No other position is left to the defendant to take, as otherwise defendant's appeal must be dismissed upon the preceding points and authorities cited. Complainant submits, with entire confidence, that the right of appeal to this court is prescribed and limited by the provisions of Congress to the cases specified, and that no provision of Congress can be pointed out, which authorizes the defendant's appeal to this court.

The act of Congress of 1891 (the present judiciary act prescribing appellate jurisdiction), established, in each judicial circuit, a United States Circuit Court of Appeals, and also specified the entire appellate jurisdiction of the Supreme Court of the United States and of the said Circuit Courts of Appeals, respectively.

The only provisions of this act, which refer to the appellate jurisdiction conferred, are:

(1) The last clause of section 4, (2) all of section 5, and (3) the first clause of section 6. These provisions are as follows:

"Sec. 4. * * * *The review by appeal*, by writ of error, or otherwise, from the existing Circuit Courts *shall be had only* in the Supreme Court of the United States or in the Circuit Court of Appeal hereby established, *according to the provisions of this act* regulating the same.

Sec. 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

(1) In any case in which the jurisdiction of the court is in issue; in such cases *the question of jurisdiction alone* shall be certified to the Supreme Court from the court below for decision.

(2) From final sentences and decrees in Prize causes.

(3) In cases of conviction of a capital or other infamous crime.

(4) In any case that involves the construction or application of the constitution of the United States.

(5) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

(6) In any case in which the constitution or law of any State is claimed to be in controvention of the constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute for review of such cases.

Sec. 6. That the Circuit Court of Appeals, established by this act, shall exercise appellate jurisdiction to review, by appeal or by writ of error, final decision in the District Courts and in the existing Circuit Courts *in all other cases other than those provided for in the preceding section of this act, unless otherwise provided by law.*" * * * 26 U. S. Stat., 827.

1. These congressional provisions gave to plaintiff and defendant, respectively, an independent right of appeal from the judgment in this case.

United States vs Jahn, 155 U. S., 109.
Northern Pacific R. vs. Glaspel, 49 Fed. Rep., 482.

2. There is no room for any inference that Congress intended to authorize or permit the Supreme Court to have or exercise any implied appellate jurisdiction or any further appellate jurisdiction from United States Circuit Courts, other than what is specified in the provisions above quoted. *Expressum facit cessare tacitum.*

National Bank vs. Peters, 144 U. S., 572-3.
Mississippi Mills vs. Cohn, 150 Id., 202-209.
Smith vs. McKay, 161 Id., 355-359.
Arkansas vs. Schlierholz, 179 U. S., 598.

The act of Congress of 1891 clearly intended to vest all appellate jurisdiction, from Circuit Courts of the United States, in the Circuit Court of Appeals, except such as was expressly vested in the Supreme Court.

First, it specified all of the appellate jurisdiction of the Supreme Court and then, by a residuary clause following, it provided, that all unspecified or remaining appellate jurisdiction from a Circuit Court should be in the Circuit Court of Appeals. This act left no remnant of appellate jurisdiction from Circuit Courts undistributed.

Lau Ow Bew vs. United States, 144 U. S., 47.
The Paquette Habana, 175 U. S., 685-6.

A right of defendant to appeal to this court because of complainant's appeal and right of appeal, cannot be inferred, in the face of such contrary provisions. The provisions of the act of Congress restrict the right of appeal from the Circuit Court to the Supreme Court to such instances as are specified in the act. By the very words of the act any right of appeal, not specified, is to the Circuit Court of Appeals, and not to the Supreme Court. Defendant's appeal is excluded thereby and should be dismissed.

3. It may be insisted, upon the following decisions, that complainant's appeal to the Supreme Court brought the whole case to this court for review, including the part of judgment adverse to the defendant:

Davis & Farnum Mfg. Co. vs. Los Angeles, 189 U. S., 207.
Scott vs. Donald, 165 U. S., 58.
Robinson vs. Caldwell, Id., 362.
Chappel vs. United States, 159 U. S., 698.
Horner vs. United States, 143 U. S., 570.

There is this difference between these cases and the case at bar. In these cases there was neither a cross appeal nor any right to one, because the entire judg-

ment was adverse to the appellant, or plaintiff in error, who brought the case to this court. The obvious reason why it is said and held in these decisions that the appeal or writ of error therein brought up the whole of the merits of the controversy, including the questions of a non-federal character, as well as those upon the federal constitution, upon which the appellate jurisdiction of this court was based, was because otherwise the appellant or plaintiff in error would have a right and be required to resort to a subsequent review of the questions of a non-federal character in the Circuit Court of Appeals.

Columbus Construction Co. vs. Crane Co., 174 U. S., 600.
Robinson vs. Caldwell, 165 U. S., 359.
Loeb vs. Columbia Township Trustees, 179 U. S., 478-9.
Cincinnati, Hamilton, etc., Ry. Co. vs. Thieband, 177 U. S., 615.

To hold that this court has any appellate jurisdiction or right of review of the judgment, in so far as it was adverse to the defendant, on complainant's appeal upon a different portion and subject matter of the judgment, would be contrary to the general scope of appeals. "An appeal in equity brings up all the matters which were decided in the Circuit Court to the prejudice of appellant," and no more of the case.

Buckingham vs. McLean, 13 How. (U. S.), 150.

See also *Kelsey vs. Western*, 2 N. Y., 500.
Williams vs. Palmer, 2 Baxt. (Tenn.), 488.
Walker vs. Pritchard, 121 Ills., 221.
Oliver vs. Wilhite, 201 Id., 552.
Northern Pacific Ry. Co., vs. Glaspel, 49 Fed. Rep., 482.
United States vs. Jaha, 155 U. S., 109.

Defendant's appeal is truly a mere expletive, if complainant's appeal reopened the controversy as to the validity of the special tax bills held void and canceled by the judgment and decree in the case.

The action of the defendant in taking an appeal from this portion of the judgment shows very conclusively the view of counsel for defendant to have been that complainant's appeal did not reopen the controversy as to the validity of the special tax bills for the Wyandotte Street pavement, held void and canceled by the judgment and decree in the case; else, why did the defendant file petition for appeal and assign errors in the lower court as to this portion of the judgment and decree?

There may be cases where this court has considered the counter-rights or counter-equities of an appellee in acting upon the particular subject matter of an appeal as a unit, and properly so. For instance, if, in a suit in equity involving an accounting of mutual demands, it appear on appeal of the complainant in the Appellate Court, that some item of the account of the complainant was erroneously discredited by the trial court, or that some item of the account of the defendant was erroneously allowed by the trial court, it would be proper, and within the jurisdiction and prerogative of the Appellate Court as a court of equity, while correcting such error, to also take into consideration and allow any counter-item or equity of the defendant to the subject matter involved in complainant's appeal, erroneously unallowed in the lower court to the defendant, and thus protect such counter equity or offset of the defendant, or in reversing and remanding the case direct the court below to do so, and this,

too, without any appeal in the case by the defendant. To this extent, and no farther, it is just and equitable that the case be considered reopened by the appeal on one side.

Gilfillan vs. McKee, 159 U. S., 316.

While there was an appeal of the defendant pending in this court in the case of the United States vs. Mosby, 133 U. S., 273, the mutual demands and rights therein involved were really only one subject matter, and the court in that case could have done what it did without an appeal on the part of the defendant because of the unity of the subject matter involved.

The same may be truly said of the Missouri decisions, *Ellis vs Harrison*, 104, Mo., 270, and *Douglass vs Kansas City*, 147 Mo., 428, because of the unity of the subject involved in those appeals. The intermediate decision upon the subject, *Reichenbach vs. The United Masonic Ben. Ass'n.*, 112 Mo., 22, recognizes the correctness of complainant's position, in a case where the subject matter of the judgment appealed from is separable, in the following words: "Findings upon distinct causes of action in the same proceeding are sometimes separable on appeal."

And see *Walker vs. Pritchard*, 121 Ills., 221.

This court may learn somewhat, if it wishes, how relevant and analagous the Supreme Court of Missouri regards the rulings of this court on its appellate jurisdiction by referring to its recent decision, not yet officially reported, (*State vs. Smith*, 75 S. W. Rep., on page 632) where it is said: "But the defendants invoke the rule of practise of the Supreme Court of the United States announced in *New Orleans Waterworks vs.*

Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936, and *Equitable Life Ins. Co. vs. Brown*, 23 Sup. Ct. 123, 47 L. Ed. —, that, when the constitutional question raised or necessarily involved has been explicitly decided in another case, it will not be regarded as properly in a subsequent case. *The practice in this court is exactly the reverse.*"

The question involved, in the case of *United States vs. Mosby supra*, (as also in the Missouri cases noted), was as to the amount involved, which is no longer a determining fact in appellate jurisdiction from federal circuit courts.

Formerly the appellate jurisdiction of this court was based upon the amount involved. "But," as since held and said by this court, "all this has been changed by the act of March 3, 1891, c 517, establishing the Circuit Court of Appeals, and creating a new and complete scheme of appellate jurisdiction, *depending upon the nature of the different cases, rather than upon the pecuniary amount involved.*"

The Paquette Habana, 175 U. S., 681.

3a. Having been unsuccessful in the trial court upon the issues of law raised on the provisions of the Constitution of the United States, complainant had an indefeasible right, under the act of Congress, to a direct appeal to the Supreme Court of the United States.

Eustiss vs. Bolles, 150 U. S., 361.
Scott vs. Donald, 165 Id., 58.
Loeb vs. Columbia Township, 179 Id., 472.
New Orleans vs. Emsheimer, 181 Id., 153.
Connolly vs. Union Sewer Pipe Co., 184 Id., 540.
Davis & Farnum Mfg. Co. vs. Los Angeles, 189 Id., 207.

Defendant could not, by taking its appeal to the Circuit Court of Appeals from the portion of the judgment and decree adverse to it and assigning errors thereon, have reopened the controversy and conferred upon the Circuit Court of Appeals the appellate jurisdiction of the subject matter in the decree adverse to the complainant. This proposition is essentially correct, for otherwise the act of Congress of 1891 did not, as construed, give an independent right of appeal to complainant and defendant.

United States vs. Jahn, 155 U. S., 109.
Northern Pacific Ry. vs. Glaspel, 49 Fed. Rep., 482.

It also follows absolutely, from the same rulings, that if defendant's appeal and right of appeal could not impair or change the appellate jurisdiction of this court of complainant's appeal, that the appellate jurisdiction of the Circuit Court of Appeals of defendant's independent right of appeal was not determined, impaired or changed by complainant's appeal. This corollary sustains complainant's motion to dismiss defendant's appeal.

4. As a farther illustration of the separableness and independence of the respective rights of appeal of complainant and defendant from the judgment and decree in this case, had the defendant perfected its appeal to the United States Circuit Court of Appeals, as authorized by the act of Congress, and had that court, on defendant's appeal, affirmed the portion of the judgment and decree adverse to the defendant, on general principles of law, such judgment of the Circuit Court of Appeals would be no bar or impairment of complain-

ant's right to subsequently appeal to the Supreme Court of the United States from the portion of the judgment and decree adverse to him.

Brennan vs. State Bank, 10 Col. App., 368.
Wickliffe vs. Buckman, 12 B. Munroe, 424.
Gates vs. Pennsylvania R. R., 154 Pa. St., 566.
State ex rel. Gunderson vs. King, 6 S. D., 297.
Kelsey vs. Western, 2 N. Y., 500.
Walker vs. Pritchard, 121 Ills., 221.
Oliver vs. Wilhite, 201 Ills., 552.

This court has repeatedly allowed even one plaintiff or one defendant a right of appeal, while it denied to other plaintiffs or other defendants a right of appeal in the same case because of the difference of the subject matter of the appeal and of a difference of the right of appeal of the parties respectively from a decree in equity; in other words, an appeal by a party entitled to appeal does not bring to the Supreme Court a different part of the decree, adverse to another party who is not entitled to appeal to this court. The subject matter of such appeal is to be regarded as independently, as if in another suit.

Fourth National Bank vs Stout, 113 U. S., 686.
Schewed vs. Smith, 106 U. S., 190.
Hawley vs. Fairbanks, 108 U. S., 549.
Stewart vs. Dunham, 115 U. S., 64-65.
Henderson vs. Wadsworth, 115 U. S., 264.
Ex Parte vs. Phoenix Ins. Co., 117 U. S., 367.
Wheeler vs. Cloyd, 134 U. S., 537.
McMurray vs. Moran, Id., 159-160.
Ogden City vs. Armstrong, 168 U. S., 224.

5. This court has also regarded a decree in equity,

where it was in part for the complainant and the remainder for the defendant, as so far severable, that the complainant could accept and appropriate the part of the decree favorable to him and afterward appeal from the remainder of the decree unfavorable to him.

Gilfallan vs. McKee, 159 U. S., 303-311.

See also *Worthington vs. Beeman*, (Ct. of App.) 91 Fed Rep., 232.

6. DIFFERENT PROCEEDINGS FOR EACH STREET PAVEMENT.—There can be no kind of doubt in point of fact or law, that there is a separate subject matter involved in the respective proceedings for the street pavements in question. There was a separate resolution of necessity for the work, a separate ordinance ordering the work and a separate contract for each of the three pavements in question, etc.

(1.) The resolution of the board of aldermen of Westport declaring the necessity of the Main Street pavement was No. 540, and adopted March 29, 1897, (page 121.)

(2.) The like resolution for the Baltimore Ave. pavement was No. 570 and adopted June 17, 1897, (page 147.)

(3.) The like resolution for the Wyandotte Street pavement was No. 590 and adopted July 15, 1897, (page 171.)

(1.) The ordinance of the board of aldermen and mayor of Westport, ordering the Main Street pavement, was No. 1803 and approved May 5, 1897, (page 122.)

(2.) The like ordinance for the Baltimore Avenue pavement was No. 1866 and approved July 16, 1897, (page 147.)

(3.) The like ordinance for the Wyandotte Street pavment was No. 1931 and approved September 3, 1897, (page 171.)

(1.) The contract for the Main Street pavement is dated May 17, 1897, (page 124.)

(2.) The contract for the Baltimore Avenue pavement is dated July 26, 1897, (page 149.)

(3.) The contract for the Wyandotte Street pavement is dated September 11, 1897, (page 173.)

(1.) The ordinance confirming the contract for the Main Street pavement was No. 1818, and approved May 19, 1897, (page 135.)

(2.) The ordinance confirming the contract for the Baltimore Avenue pavement was No. 1888 and approved August 4, 1897, (page 161.)

(3.) The ordinance confirming the contract for the Wyandotte Street pavement was No. 1949 and approved September 22, 1897, (page 183.)

(1.) The ordinance levying assessments against abutting lands for the Main Street pavement was No. 1976 and approved October 5, 1897, (page 140.)

(2.) The like ordinance for the Baltimore Avenue pavement was No. 2046 and approved November 18, 1897, (page 165.)

(3.) The like ordinance for the Wyandotte Street pavement was No. 2047 and approved November 18, 1897, (page 187.)

Finally, there was a separate series and issue of

the special tax bills for each of the pavements in question.

(See allegations of bill, page 3; admitted in answer, pages 8 and 9.)

Westport, was a city of the fourth class. (See allegations of bill, page 1; admitted in answer, page 8). A separate resolution, separate ordinance, separate contract, etc., for each of the pavements were required by the charter provisions governing such a city.

City to use vs. Eddy, 123 Mo., 558-9.

(While the decision cited was upon charter provisions governing cities of the third class, such provisions are identically the same provisions as will be seen in the charter of cities of the fourth class. (Missuori session laws 1895, page 84, Sec. 85; page 86, Sec. 95).

It is perfectly obvious that a separate suit could have been maintained in any court of equity for the cancellation of the special tax bills for any one of the street pavements in question, and that an adjudication of the validity or invalidity of the special tax bills for such one of the three street pavements in question would be no adjudication as to the validity or invalidity of the special tax bills for the other two pavements in questions, or either of them. In such case, when, as here, the questions are in one suit as to the three street pavements, the questions of law and fact as to each street pavement are to be determined as independently as if involved, each in a different suit.

Worthington vs. Beeman, 91 Fed. Rep., 232.
Manitoba Fish Co. vs. Booth, 109 Fed. Rep., 594.
See also decisions of this court cited ante page 21.

THE SUBJECT MATTER INVOLVED IN DEFENDANT'S APPEAL IS SEPARATED FROM THE SUBJECT MATTER OF COMPLAINANT'S APPEAL, IN THE JUDGMENT AND DECREE, AND IS SEPARATED BY THE APPEALS RESPECTIVELY.

The subject matter of the judgment and decree adverse to the defendant is not lumped nor mingled with the portion of such judgment and decree adverse to the complainant. It orders, adjudges and decrees the invalidity of the particular special tax bills for the Wyandotte Street pavement, also the invalidity of the resolution, ordinances and contract aforesaid for the Wyandotte Street pavement, and in full, insofar as the said judgment and decree was adverse to the defendant, is as follows:

"And the court doth find, order, adjudge and decree that neither the complainant nor his lots of land described in his bill in equity herein, as charged with the special tax bills, hereinbefore called tax certificates, for said Wyandotte Street pavement, towit, lots three (3) and four (4) in block forty-one (41), and lot one (1) in block forty-nine (49), and all other property and lands facing on said Wyandotte street between Thirty-Eighth Street and Thirty-Ninth Street, all in Hyde Park, in said late city of Westport, Missouri, is in any way liable or chargeable for the work done by the defendant company in said Wyandotte Street pavement aforesaid. That the said Wyandotte Street special tax bills and certificates aforesaid are void, and were void when issued to the defendant in payment for said Wyandotte Street pavement aforesaid, for the reason that the prior proceedings taken by the city authorities of the city of Westport, in the year 1897, upon which the work was done and said tax bills were issued, towit: The resolution No. 590 of the Board of Aldermen of said City of Westport declaring the work of paving

Wyandotte Street necessary to be done from the south line of Hunter Avenue to the north line of Westport Avenue, in said city, adopted July 15, 1897; also the ordinance No. 1931 of said city, entitled, "An ordinance to pave Wyandotte Street from the south line of Hunter Avenue to the north line of Westport Avenue," approved September 3, 1897; also the contract between said city of Wstport and the defendant for said street pavement made under and pursuant to said proceedings; also the ordinance No. 1949 of the said city confirming the contract for said street pavement; also ordinance No. 2047 of said city, levying special tax and assessments and ordering special tax bills for said Wyandotte Street pavement, and each of them are void and were void *ab initio*. It is further considered, adjudged and decreed by the court that the defendant and its agents are hereby perpetually enjoined and restrained from transferring the said Wyandotte Street special tax bills aforesaid, or any of them issued against the property of complainant aforesaid, for the Wyandotte Street pavement aforesaid, also from bringing or prosecuting any action upon any of said special tax bills aforesaid in any other court, and that the defendant within sixty days bring the special tax bills aforesaid into this court and here cancel and remove the same as claims and clouds against the real estate aforesaid." (Page 24.)

The petition for appeal and assignment of errors therewith filed by the defendant, and the order allowing the defendant the appeal is in terms limited to this portion of the judgment as the subject matter involved in defendant's appeal. (Pages 32-35.)

AB INCONVENIENTI, NOT AN ARGUMENT OF WEIGHT IN THIS CASE. Diverse appeals in this case would have worked no inconvenience. The

appeal of the defendant to the Circuit Court of Appeals, would, if asked and allowed, have been stayed there till complainant's appeal in the Supreme Court was disposed of.

United States vs. Jahn, 155 U. S., 109.
Northern Pacific Ry Co. vs. Glaspel, 49 Fed. Rep. 482.

In such diverse appeals, each appellant, by filing a *precipe* with the clerk of the trial court, could have confined the contents of the transcript to the portions of the record, material or necessary to the hearing of his appeal. This practice is not only permitted but urgently invited by both this court and the Circuit Court of Appeals.

Teller vs. United States, 111 Fed. Rep. 119.
Id. 168.
Cunningham vs. German Savings Bank, 103 Id., 932.
Hunt vs. Kile, 98 Id., 49-51.
Burnham vs. North Chicago St. Ry. Co., 87 Id., 168.
Meyer vs. Mansus & Libbet's Imp. Co., 85 Id. 874.
Gregory vs. Pike, 64 Id. 415.
Starke vs. Klein, 62 Id., 502.
Norhna & L. R. Corp. vs. Boston, etc., 51 Id. 929, 61 Id. 237-8.
Blanks vs. Klein, 49 Id. 1.
Railway Co. vs. Stewart, 95 U. S., 279.
Railway Co. vs. Schutte, 100 U. S., 644-647.
The "Adriatic" 103 U. S., 730.
Ball & Socket Fastener Co. vs. Kractzer, 150 U. S., 112.

And thus each appellant could have prevented the sending to the Appellate Court the several hundred pages of redundant and effete matter in the transcript filed in this case. But with defendant's appeal also to this court, complainant's right to thus restrict the transcript to the relevant parts of the record was not so clear. Defendant, by its appeal, had colorably an equal right to control the transcript. From the drag-net form of the designations of what should be printed, filed by defendant with the clerk here, it ought not to be difficult for the court to determine how impossible it was, with defendant's appeal to this court, for the complainant to limit the transcript in this case.

RULING ON MOTION NOW SUBMITTED SHOULD NOT BE DEFERRED—The complainant submits that the court should sustain his motion to dismiss the defendant's appeal and should not defer the decision thereof until the final hearing of the case for the following reasons:

1. The complainant is entitled thereto.

2. If there is any doubt in the mind of the court as to its having been previously decided, should not the question be settled and the ruling of the court thereon published at once for the guidance of litigants and inferior courts in subsequent cases?

3. If the motion be sustained before the submission of the case, the future work of the court and counsel in the case will be reduced probably at least forty per cent.

4. If the disposition of the motion be deferred till the hearing of the case, it will become necessary for counsel to ask additional time for argument in the case.

Respectfully submitted,

RICHARD H. FIELD,
Complainant, in person.

Supreme

Richard H.

vs.

Barber Ass

Barber Ass

vs.

Richard H.

BRIEF

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

RICHARD H. FIELD,
Appellant,
vs.
BARBER ASPHALT PAVING COMPANY,
Respondent.
} Term No. 201. File No. 18797.

BARBER ASPHALT PAVING COMPANY,
Appellant,
vs.
RICHARD H. FIELD,
Respondent.
} Term No. 202. File No. 18798.

Appeals from the Western Division of the Western District of Missouri.

CONCISE STATEMENT OF THE CASE.

The above are cross appeals of complainant and defendant from a judgment and decree in a suit in equity in the United States Circuit Court at Kansas City, in and for the Western Division of the Western District of Missouri. (See printed record, page 35).* The Honorable Smith McPherson of Red Oak, Iowa, of the Federal District Court of Iowa,

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* The figures in parenthesis, after paragraphs hereinafter set forth, are the pages of the printed record prepared and filed in this case by the clerk of this court.

acted as judge of the trial court in this case and rendered the judgment and decree, from which these appeals were allowed (see page 23).

Suit to Cancel Special Tax-bills, etc. The case is this: On January 4th, 1900, Richard H. Field, as complainant, filed a bill in equity in the United States Circuit Court at Kansas City, Mo,, against the Barber Asphalt Paving Company, as defendant, praying the court to cancel and adjudge void, etc., as clouds on the title to complainant's lands in the late city of Westport, Mo., now in Kansas City, Mo., 17 special tax-bills aggregating, exclusive of interest and costs, the sum of $3,376.45, purporting to have been issued by the city of Westport, as a Missouri fourth-class city, to the defendant paving company, for paving done by defendant on Main St., Baltimore Ave., and Wyandotte St. in said city of Westport.

(See complainant's bill, printed record, page 1).

Allegations of the Bill, The allegations of complainant's bill, as amended, omitting the parts not here involved, are as follows:

"*First.* Complainant is a resident of Kansas City, in the Western Division of the Western Judicial District of the State of Missouri, and a citizen of said state, and that defendant is now and was at the times hereinafter named a citizen, and a duly created, organized corporation of the state of West Virginia, and engaged in street paving in Kansas City, Missouri (page 1).

"*Second.* (1) Complainant owns and owned at the times hereinafter named, the following described real estate in Jackson county, Missouri, to-wit: lots 1, 2, 7 and 8 in block 39; also lots 3 and 4 in block 41; also lot 1 in block 49; also the south 15 17-100 ft. of lots 1 and 2 in block 50; also an undivided one-half of lots 1, 2, 3, 4, 5, 8, 9 and 10 in block 45, all in "Hyde Park", a platted addition on file and recorded in the office of the recorder of deeds in Jackson county, Missouri, at Kansas City, (page 1).

(2) Which real estate was, when the pavements hereinafter mentioned, ~~ordered and~~ were contracted for and done, in the corporate limits of Westport, Missouri (page 1).

(3) The city of Westport was then duly incorporated and duly acting as a city of the 4th class in the state of Missouri under an act of the General Assembly of said state, entitled "An act to repeal article V, chapter 30, of the Revised Statutes of Missouri of 1889, and certain amendments thereto; said article V being entitled 'cities of the fourth-class,' and to enact in lieu thereof a new article providing for government of cities of the fourth-class," approved April 11th, 1895 (page 1).

(4) That on December 2nd, 1897, said city of Westport ceased to exist and the real estate aforesaid of complainant has been since then within the corporate limits of Kansas City, Missouri, by virtue of the extension of the territorial limits of said Kansas City, duly made on that day whereby the whole of the territory of said city of Westport was included within the corporate territorial limits of Kansas City. (page 2).

"*Third.* (1) The defendant is the owner and holder of certain instruments of writing purporting to be special tax-bills issued October 5th, 1897, and November 18th, 1897, to it by said late city of Westport, against said lots respectively according to their frontage on and for the paving hereinafter mentioned on Main street, from the center line of Springfield avenue or 31st street to the north line of Westport avenue; Baltimore avenue from Hunter avenue to the north line of Westport avenue; Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue in said city of Westport, amounting in the aggregate to the sum of $3,376.45, exclusive of interest and costs (page 2).

(2) And the defendant claims that the said special tax-bills are liens respectively on and against the real estate aforesaid (page 2).

"*Fourth.* (1) All of the real estate aforesaid is vacant and unimproved, and the greater part of the other land fronting on the street pavements aforesaid ~~is~~ are vacant and unimproved and unto at the times named herein (page 2).

(2) That complainant was not at any time herein named a resident of said city of Westport, but was at all

the times herein named a resident of Kansas City, Missouri, and the owner of the real estate hereinbefore described. That sections 88 and 95, inclusive, of the Act of the General Assembly of the state of Missouri, aforesaid, under which the tax-bills in question are claimed by the defendant as liens upon the complainant's real estate, deprive the complainant of his said real estate without due process of law, and deny the complainant the equal protection of the laws afforded to resident owners of property in said city of Westport, and take his property for the private use of said residents, and violate section 1 of the 14th amendment to the Constitution of the United States (page 2).

"*Fifth.* (1) The tax-bills aforesaid issued to the defendant for the paving aforesaid on Baltimore avenue were dated November 18th, 1897, and against the lots described in charge "second" of this bill, in amounts as follows:

Against lot 7 block 39	50 ft. front	....	$141.96
" " 8 "	60 " "	.....	170.35
" " 8 "	50 " "	.....	132.92
" " 9 "	" " "	.....	132.90
" "10 "	" " "	.....	132.92
" " 1 "	98 52-100 " "	.....	180.00
" S 15 17-100 ft. lot 2 blk 50 15 17-100"		.....	43.07

Total assessed against above lots for Baltimore avenue paving (pages 2 and 3) $934.14

(2) That the tax-bills aforesaid issued to defendant for the paving aforesaid on Wyandotte street was dated November 18th, 1897, and against lots described in charge "second" of this bill in amounts as follows:

Against Lot 3 Block 41	50 ft. front	.....	$172.68
" " 4 "	" " " "	.....	172.68
" " 1 "	49 98-78 ft. front	.....	358.08

Total assessed against above lots for Wyandotte street paving, (page 3) $703.44

(3) That the tax bills aforesaid issued to defendant for the paving aforesaid on Main street were dated October

5th, 1897, and are against lots described in charge "Second" of this bill, in amounts as follows:

Against Lot	1	Block 39	60 ft.	front	$266.13
" "	2	" "	50 ft.	"	221.77
"S. 15ft	1	"	50 15 ft.	"	66.50
" Lot	1	"	45 50 ft.	"	232.23
" "	2	" "	" "	"	232.23
" "	3	" "	" "	"	232.23
" "	4	" "	" "	"	232.23
" "	5	"	55.05 "	"	255.55

Total assessed against lots for Main street paving (page 3).....$1736.87

"*Sixth*—(1) For the purpose of forestalling any remonstrance from the residents of the city of Westport owning property fronting on such pavements before any plans or specifications for them, or either of them, were made and filed in said city of Westport, and before any resolution or ordinance ordering such streets, or either of them, to be paved were passed, the defendant circulated among such residents a petition in each case asking the board of aldermen of said city of Westport to cause such work to be done, and induced the said residents of said late city of Westport to sign said petition, and to refrain from remonstrating against such improvements (page 3). (The part of this charge of the bill, next following the above, and here omitted; is omitted for the reason that there is no error assigned thereon).

(2) And thereupon defendant caused to be drawn plans and specifications, resolutions and ordinances for the work, which were adopted by the board of aldermen of said city of Westport (page 4),

(3) And the order for the work aforesaid upon each of the streets aforesaid was in each case not due to any necessity therefor, (page 4),

(4) or because the said board of aldermen deemed the same, or any of them necessary to be done (page 4),

(5) but because of the lobbying and conduct aforesaid of the agents and servants of the defendant owners (page 4),

(6) and because of their lobbying with the board of aldermen of the city of Westport, (page 4),

(7) and the defendant's undue and illegal influence over the board of aldermen of said city of Westport (page 4),

"*Seventh*—(This charge of the bill is omitted for the reason that no errors are assigned to the decision of the court thereon.)

"*Eighth*—(This charge of the bill, including any amendments thereto, is omitted for the reason that no errors are assigned to the decision of the court thereon.)

"*Ninth*—That the defendant had exclusive control of the importation, sale and use of the genuine Trinidad Lake Asphalt in and to the said city of Westport at the times of the specification of the same by the city of Westport for the three street pavements here in question. (Page 5).

"*Tenth*—That with a view to lessen, and which tended to lessen, full and free competition in the importation, manufacture and sale of other good and useful brands of asphalt for street paving, the board of aldermen of said city of Westport, at the instigation of the defendant, and by arrangement and agreement and combination with the defendant, specified and required in the resolutions, ordinances and contracts with the defendant, that each of the street pavements here in question should "consist of a genuine Trinidad Lake Asphalt pavement" (Page 5).

"*Amendment to Tenth charge of the Bill.* (1) That the defendant, the city engineer, the board of aldermen and mayor of said city of Westport conspiring, combining and contracting in restraint of trade and commerce among the several states and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the state of Missouri, caused to be specified in the resolutions and ordinances of said city, and contracts for the paving in question, that it should consist of a genuine Trinidad Lake Asphalt, thereby meaning and intending the asphalt produced and existing in Trinidad Lake, of the Island of Trinidad, without the United States, and within the domain of another nation, and

(2) The defendant, at and before the dates alleged in this bill, monopolized and attempted to monopolize, combined and conspired with said city authorities and other persons unknown to complainant, to monopolize the trade and commerce among the several states as to the importation,

sale and use of Trinidad Lake Asphalt, whereby it had, and attempted to have at the times here in question, the exclusive control of the importation, the sale and use of said asphalt in and to the city of Westport and Kansas City, Missouri, so that when the defendant induced and persuaded the city authorities of said city of Westport to specify genuine Trinidad Lake Asphalt in its resolutions, ordinances and contracts for the pavements in question, it had monopolized, and attempted to monopolize, a part of the trade and commerce of the several states and with foreign nations, all in violation of the Act of Congress contained in the Act of July 2, 1890, 'to protect trade and commerce against unlawful restraints and monopolies,' and

(3) the said resolutions and ordinances of said city of Westport also violate the commerce clause of Section 8 of Article I of the Constitution of the United States (page 22).

"*Eleventh* (This charge of the bill is omitted for the reason that no evidence was offered thereon).

"*Twelfth.* That the reason this action has not heen brought before is that to within two days of the present time since and before the issue of the tax-bills in question the complainant and agents of the defendant have had pending, propositions to a compromise and settlement of the same to avoid litigation" (page 6).

Prayer. The prayer of the bill is that the defendant be required to answer the premises, and that the court grant complainant a perpetual injunction restraining defendant, his agents and servants, from transferring the said tax-bills, or any of them, to any other person; also from bringing any other action in any other court; also from prosecuting any action that may hereafter be brought in any other court; and that the defendant be required to bring the said tax-bills into court and cancel and remove the same as claims or clouds against the real estate aforesaid of complainant, and for such other and further relief in the premises as the nature of the case will require and to the court may seem meet, and for all costs of this suit. (Then follows a prayer for writ of subpœna, etc., pages 6 and 7).

Defendant's Answer. The defendant's admissions and denials of allegations of the bill will be stated and cited in the "Brief of the Argument" *post.*

The new matter in Defendant's Answer. The defendant's answer alleged the following:

"This defendant states that the streets improved as aforesaid are streets running north and south in front of the lots hereinbefore described and extend therefrom directly and through the center and business portion of Kansas City, Missouri, which is a great and growing city which has more than two hundred thousand (200,000) inhabitants, and that the lots hereinbefore mentioned and described are in one of the most fashionable and rapidly developing residence localities of the said city; that all the lots and lands fronting on that portion of each of the streets improved as aforesaid, are similarly situated with reference to the street so improved with other lots fronting thereon and are of equal value with the other lots fronting on said streets within the distance improved as aforesaid, were enhanced and increased in value by reason of the pavement of said street with asphalt directly in proportion to the frontage of each lot or tract of land upon such improvement and to an extent greater than the amount charged against such lot or tract of land to pay for such pavement and as evidenced by the special tax-bills hereinbefore referred to.

This defendant admits that the complainant, R. H. Field, was not, at the time the contracts were made for and the work of paving the streets done as aforesaid, a resident of the city of Westport, but states that the said Field at all such times was a resident of Kansas City, Missouri, and knew that the said contracts were being let and that the said work was being done, and that he did not at any time object to, protest or remonstrate against the doing of said work until after the completion thereof by the defendant herein and its acceptance by the said city of Westport, and that he, the said Field, at all times consented to the paving of said streets by this defendant and the improvement of his property thereby, and has at all times heretofore and now has benefit of the said improvements." (page 10.)

General Replication. The complainant filed general replication denying in due form the allegations of the answer. (page 14).

Decree and Judgment. On October 10th, 1902, the court entered its finding, judgment and decree in this case, as follows:

For the Complainant. (1) That Westport, at the times in question, was a Missouri city of the fourth class, having the powers of a city of that class as conferred by the laws of Missouri and none other.

(2) That Westport ceased to exist, and became a part of Kansas City, Missouri, December 2nd, 1897.

(3) That the defendant held all of the special tax-bills alleged in complainant's bill against complainant's lands as alleged in complainant's bill.

(4) And the court by its judgment and decree held and adjudged void the special tax-bills held by the defendant for the Wyandotte street pavement against the complainant's property, and granted complainant all of the relief prayed for in his bill as to the said Wyandotte street special tax-bills.

For the Defendant. The finding, judgment and decree of the court was for the defendant, the Barber Asphalt Paving Co., on the issues in the case as to the validity of the alleged special tax-bills for the Main street and Baltimore avenue paving in question; the court adjudged and decreed the said special tax-bills valid and binding charges of defendant against complainat and his property; the court also adjudged and decreed that complainant have and recover no relief as to the Main street and Baltimore avenue special tax-bills, aforesaid, and that complainant's bill, filed herein be dismissed, as to the said Main street and Baltimore avenue special tax-bills (pages 23-24).

The costs of the case taxed and adjudged against complainant and defendant equally.

Appeals. At the ensuing term of the court, towit, at the November term, on the 18th day of December, 1902, complainant and defendant, respectively asked and each were allowed an appeal to the Supreme Court of the United States (Id. page 35).

Questions Raised and Involved in Complainant's Appeal. The questions raised and involved in complainant's appeal are as to the validity of the special tax-bills, for the Main street and Baltimore avenue pavements aforesaid, which were adjudged valid and binding charges upon complainant and his property. The grounds of illegality of the special tax-bills in question, as alleged in complainant's bill, and his assignment of errors filed to and upon the judgment appealed from are the following:

1. That the provisions of the Missouri State Legislative Act (Laws of 1895, sections 88 to 95, Inc., pages 85 and 86) under which the tax-bills in question are claimed by the defendant as liens upon the complainant's real estate, deprive the complainant of his said real estate without due process of law, and deny the complainant, a resident of Kansas City, Mo., the equal protection of the laws afforded to resident owners of property in said city of Westport, and take his property for the private use of said residents of Westport, and violate section 1 of the 14th amendment to the Constitution of the United States.

2. That the resolutions adopted by the board of aldermen of Westport declaring the street pavements in question necessary, were unauthorized and are void because each of said resolutions also declared and specified that the pavement should consist of a "genuine Trinidad Lake Asphalt pavement."

3. That the "Trinidad Lake Asphalt" specification in the resolutions and ordinances for the pavements makes a monoply in an article of interstate and foreign commerce and cannot be saved from illegality and nullity under cloak of a municipal liberty of judgment and action upon the subject.

4. That the ~~city~~ resolutions and ordinances ordering the asphalt pavements in question specified and required "Trinidad Lake Asphalt" as the asphalt to be used in such pavement, and excluded from the market for use, and from being contracted for, and from being used in said pavements, the asphalt of other foreign countries and of the United States, and violated the commerce clause of section 8 of article 1 of the Constitution of the United States.

5. That the resolutions, ordinances and contracts for the street pavements in question, respectively, violated the act of Congress of July 2, 1890, entitled "To protect trade and commerce against unlawful restraint and monopolies."

6. That the contracts for each of the street pavements in question were in restraint of trade and commerce among the several states and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri in specifying that the pavement in question should "consist of a genuine Trinidad Lake Asphalt," and violated the anti-trust act of Congress, aforesaid.

7. The specification in the resolutions, ordinances and contracts for the pavements in question that they should "consist of a genuine Trinidad Lake Asphalt" was due to a conspiracy or combination between defendant and the Westport city authorities in violation of the anti-trust act of Congress, aforesaid.

8.—That the defendant, at and before the dates alleged in the bill, filed in this case, monopolized, or attempted to monopolize the paving of streets with "Trinidad Lake Asphalt" in Kansas City and Westport, Mo., and had

and attempted to have, at all the times here in question, the exclusive control of the importation, sale and use of "Trinidad Lake Asphalt" in the city of Westport, Mo., in violation of the anti-trust act of Congress aforesaid.

9. That defendant had a monopoly of the importation, sale and use of "Trinidad Lake Asphalt" in and to the city of Westport, Mo., at the times in question.

10. That with a view to lessen, and which tended to lessen, full and free competition in the importation, sale and use of other good and useful brands of asphalt for street paving the board of aldermen of the city of Westport, at the instigation of the defendant and by arrangement, agreement and combination with the defendant specified and required in the resolutions, ordinances and contracts, that each of the street pavements here in question should "consist of a genuine Trinidad Lake Asphalt" pavement.

11. The resolutions and ordinances in question, and each of them, are void for the following additional facts not appearing on the face thereof, to-wit: the resolutions and ordinances of the board of aldermen of Westport for the pavements in question were not adopted, and the work was not ordered by the board of aldermen of Westport, because said board deemed the said pavements, or either of them, necessary, but because of the lobbying of the defendent with the board of aldermen of Westport for said work, and because of the defendant's undue and illegal influence over said board of aldermen.

12. That the special tax bills against lots 1 to 5, inclusive, in block 45, for the Main street paving are void, because the city authorities of Westport were not authorized in 1897 to include in the Main street pavement in question the south block thereof, to-wit: the block extending from 39th Street to Westport Ave. and assess any part of the cost thereof against the abutting lands on this part of Main street when there was then a good and substantial macadam pave-

ment thereon in no need of repairing or replacement by another pavement for the public use or for safe and convenient travel thereon.

Specification of errors Relied Upon by Complainant.

1. The judgment and decree in this is erroneous as follows: The court erred in adjudging and decreeing valid and binding on complainant and his property the special tax-bills issued to defendant for the paving of Main street, in question.

2. The court erred in adjudging and decreeing valid and binding on complainant and his property the special tax-bills issued to defendant for the paving of Baltimore Avenue, in question.

3. The court erred in ordering and decreeing that complainant have and recover no relief as to the Main street special tax-bills described in his bill filed in this cause.

4. The court erred in ordering and decreeing that complainant have and recover no relief as to the Baltimore Ave. special tax-bills described in his bill filed in this cause.

5. The court erred in ordering and decreeing that complainant's bill be dismissed as to the Main street special tax-bills, in question in this cause.

6. The court erred in ordering and decreeing that complainant's bill be dismissed as to the Baltimore Avenue special tax-bills described in his bill filed in this cause.

7. The court erred in not adjudging and decreeing void, and in not canceling the special tax-bills in question for the Main street pavement.

8. The court erred in not adjudging and declaring void the special tax bills in question for the Baltimore Avenue pavement.

(See complainant's assignment of errors. Page 25.)

Questions Involved in Defendant's Appeal.

The defendant's appeal is from the portion of the judgment and decree adjudging void, etc., the special tax-bills, etc., for the Wyandotte street pavement. The assignment of errors filed by the defendant, in substance, assigns two errors of the court in this part of the judgment and decree in question, as follows:

First—(No. "I", "first" to "eighth", inclusive)—That the court erred in holding the Wyandotte street pavement was unnecessary, and that the proceedings therefor, to-wit, the resolution, ordinance and contract of the board of aldermen of Westport for the repavement of Wyandotte street with asphalt, and the tax-bills therefor, were unauthorized and void.

Second—(No. "II")—"The defendant says that the decree heretofore rendered and entered in said cause, in so far as it adjudges and decrees that the said Circuit Court had jurisdiction over this suit, and that the amount in dispute is not less than Two Thousand Dollars, is erroneous and against the just rights of the defendant." (Printed Record, Pages 32-34).

Motion to Dismiss Defendant's Appeal

There is now pending a motion, filed by complainant, to dismiss the defendant's appeal. After due notice to the defendant this motion was submitted to the court on Monday, October 26, 1903. On the following Monday, November 2, 1903, the court announced its order, that this motion would be disposed of with the case on its merits.

BRIEF OF THE ARGUMENT.

Complainant's Bill

The court will avoid any confused view of the alleged illegalities of the special tax-bills here involved, by avoiding all allegations of the bill of other illegalities on which no errors have been assigned by either appellant. Such effete parts of the bill are omitted and indicated as omitted, and the other parts of the bill, which are alive in this court, are printed as the "allegations of complainant's bill" in the "concise statement" (*ante* page 2 *). Each allegation of the bill is here put in a distinct paragraph, which is followed by a citation to the page of the printed record at which such paragraph may be verified.

Topical Statement of the Proofs, etc.

The following is submitted as a statement of all the proofs and other matters in the case, relevant to any question in either appeal. Where testimony is undisputed or documentary, this statement in large part recites such testimony as facts; but wherever there is or can be any difference of view, as to the meaning of any document or testimony on any issue in the case, such document is set out *haec verba*, and all such testimony of any witness is fully abstracted.

SECTION A.

Diverse Residence and Citizenship.

"First" charge of bill (*ante* page 2). This allegation is admitted in defendant's answer (pages 7 and 8 *).

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* NOTE—*The figures in parenthesis, after paragraphs hereinafter set forth, are pages of the printed record prepared and filed in this case by the clerk of this court. The other references "ante" and "post" are to the "concise statement" ante, and to this "topical statement of the proofs," etc.*

SECTION B.

Amount Involved.

"Third" charge of the bill (*ante* page 2). The allegations of the bill are: That defendant is the owner and holder of special tax-bills aggregating $3,376.45, exclusive of interest and costs, purporting to have been issued against the real estate aforesaid by the late city of Westport for paving done by defendant in the city of Westport on Main St., Baltimore Ave., and Wyandotte St., respectively.

"Fifth" charge of the bill (*ante* page 3). That the special tax-bills against the complainant's real estate for the respective pavements aforesaid, were as follows:

For the Baltimore Ave pavement:

Against lot	7,	Block	39,		$141.96
" "	8,	"	"		170.35
" "	8,	"	45,		132.95
" "	9,	"	"		132.90
" "	10,	"	"		132.92
" "	1,	"	49,		180.00
15 17-100 ft.	lot 2	bl'k	50,		43.07

Total assessment against above lots for Baltimore Ave. pavement $934.14

For the Wyandotte St. pavement:

Against lot	3,	Block	41,		$172.68
" "	4,	"	"		172.68
" "	1,	"	49,		58.08

Total assessed against above lots for Wyandotte St. pavement $703.44

For the Main St. pavement:

Against lot	1,	Block	39,		$266.13
" "	2,	"	"		221.77
" "	1,	"	50,	south 15 ft.	66.50
" "	1,	"	45,		232.23
" "	2,	"	"		232.23
" "	3,	"	"		232.23
" "	4,	"	"		232.23
" "	5,	"	"		232.23

Total assessed against above lots for Main St. pavement $1738.87

The answer admits that the defendant holds all of the above special tax-bills against the above described lots of land, except the one for the Wyandotte street pavement against *lot 1, block 49*, for $358.08 and alleges that these tax-bills are respectively valid and subsisting liens upon the several lots above described. (Pr. Rec. 8 and 9).

The ordinance levying the assessments for the Wyandotte street pavement shows a levy against lot 1 in block 49 above alleged (page 186), and the undisputed testimony of complainant was that since he filed this bill he had been sued in the State court on all of these tax-bills (page 199).

SECTION C.

Complainant's Title to lands.

"Second" charge of bill (*ante* page 2). Defendant's answer admits, that complainant owns and owned at the times in question lots 1, 2, 7 and 8 in block 39; lots 3 and 4 in block 41; lot 1 block 49; the south 15 17-100 ft. of lots 1 and 2, block 50, "Hyde Park" in the late city of Westport, now a part of Kansas City, Mo., but denies that complainant owns or owned at the times in question an undivided half of lots 1, 2, 3, 4, 5, 8, 9, and 10 in block 45, "Hyde Park" in the late city of Westport, now a part of Kansas City, Mo. (page 8).

Complainant offered evidence showing that he also owned, at all times in question, the undivided one-half of *the lots in block 45*, in issue. Such evidence was undisputed and unquestioned and is as follows:

(1). A deed from Sarah P. Anderson to Annie Camp Field, dated July 14th, 1886 (page 199).

(2) This deed, as appears from the undisputed testimony, was the result of a written contract of sale of the property dated June 21st, 1886, entered into by Mrs. Sarah P. Anderson (the grantor and then owner of the property), and R. H. Field (the complainant) as the purchaser (page 201).

(3) The purchase money of this property was $10,000. George H. Camp, father of complainant's wife, Annie Camp

Field, advanced and paid one-half, and complainant, R. H. Field, paid the other half of the price of this property. (Id.)

(4) The land described in this deed was afterwards, in 1897, platted as block 45, "Hyde Park," with lots numbered 1 to 10 (Id.).

(5) Since then only two of the lots were sold (Id.).

(6) On September 18th, 1895, (more than four years before this suit was filed), Annie Camp Field, on complainant's request, signed and delivered to complainant a written declaration of trust. This declaration of trust is in the record as offered in evidence by complainant, and recites that Annie Camp Field held the lots in block 45 in her name in trust for George H. Camp and R. H. Field, equally, and also recites that she held in her name in trust for George H. Camp title to lot No. 1, block No. 6, Coates Addition to Kansas City, not here in question (Id.). This declaration of trust, as shown by the undisputed testimony of the complainant, was, on the date aforesaid (September 18, 1895) forwarded to Mr. Camp, the co-beneficiary therein, and was held by him until loaned to complainant for use in the taking of testimony in this case (page 202). This testimony was taken March 24th, 1900 (page 194).

(7) Complainant had actual and exclusive possession of the lots in block 45, paid the yearly taxes thereon, and claimed them for himself and Mr. Camp since 1887 or 1888 (p. 202), more than ten years before January 4th, 1900, the day this suit was filed (page 1).

(8) Complainant also showed that after this suit was commenced, Annie Camp Field signed and delivered to him another declaration of trust wherein she acknowledges in due form of law that she holds in her name for him one-half of the title to the lots in said block 45. This declaration of trust was also read in evidence, and is in the record of this case (page 203).

The foregoing was all of the testimony offered on the issue as to complainant's title to the lots in block 45.

SECTION D.

The Issue as to Complainant's Title Abandoned.

There was no further testimony taken, and not a question was asked by defendant, on the issue tendered in the answer as to complainant's title and interest in the lots in block 45, but on other issues in the case, the defendant took over 300 pages of depositions, which are in the transcript filed in this case. (See printed index to testimony taken by defendant). In depositions taken and filed by defendant in this case will be found the following questions to the witnesses by Mr. Scarritt, solicitor for defendant.

E. R. CRUTCHER (page 257):

DIRECT EXAMINATION BY MR. SCARRITT.

"Q. Please state your name, place of residence and occupation? A. E. R. Crutcher, Kansas City, Missouri. Real estate and fire insurance (page 257).

Q. Are you familiar with the real property fronting on Main street from 31st street to Westport avenue and on Baltimore avenue and Wyandotte street between Hunter avenue and Westport avenue in this city? A. I am.

Q. Are you familiar *with the property of complainant in this suit, which is described in the tax-bills referred to in the bill of complaint*, fronting on these three streets? A. I am in a general way.

Q. Will you state whether or not in your opinion the lots of the complainant, Field, fronting on Main street, and abutting on the asphalt pavements, constructed as alleged in the bill of complaint in the fall of 1897 in front of his lots, were especially benefited and enhanced in value by reason of the construction of that pavement? A. I think it was" (page 258).

A. B. BEEDLE (page 271):

DIRECT EXAMINATION BY MR. SCARRITT.

"Q. Please state your name, place of residence and occupation? A. A. B. Beedle, 3608 Baltimore avenue,

Kansas City, Missouri. Business, real estate and insurance (page 271).

Q. *Are you familiar with the lots of the complainant Field, described in the bill of complaint in this suit,* some of which front on each of these streets? A. Why, I am familiar with all the ground in both blocks.

Q. Referring to lots one and two, block 39, and the south 15 feet of lot one, block 50, that joins the two last above described in Hyde Park, and *also lots one to five, block 45, also in Hyde Park* which front on Main street, you may state whether or not in your opinion these lots were especially benefited and enhanced in value by reason of the construction of the asphalt pavement under the contract referred to in the bill of complaint, and if so please state the extent of their special benefits? A. Why in my opinion they were benefited by the pavement (page 272).

Q. *Now it appears from the allegations of the bill that complainant owns lots eight, nine and ten, block 45, Hyde Park,* lots seven and eight, block 39, lot one, block 49, and the south 15.17 feet of lot 2, block 50, which abut on Baltimore avenue, please state whether or not in your opinion these lots were especially benefited and enhanced in value by reason of the construction of the asphalt pavement on Baltimore avenue under the contract referred to in the bill of complaint? A. Yes, sir. * * *" (page 273).

CHAS. E. FINLAY: Direct examination by Mr. Davis

"Q. Please state your name, residence and place of business? A. Chas. E. Finlay, etc. (page 287).

Q. State to what extent you have held property in the southern portion of this city? A. Well, I built some houses on Baltimore avenue and Main street and Wyandotte street (page 287).

Q. *Are you familiar with the lots owned by complainant Field in this case, described in the bill of complaint,* some of which front on each of the streets you have named? A. Yes, sir.

Q. You may state whether or not in your opinion *the lots of the complainant referred to* in the bill of complaint were especially benefited and increased in value by reason of the construction of the asphalt pavements on the streets in

front of them under the contract referred to in the bill of complaint? A. Yes, sir, I should think they were, etc.

Q. Does that answer ~~then~~ apply to his lots on each of the streets named? A. Yes, sir," etc. (page 288).

Section E.

Lands in the City of Westport.

The allegation in the "second" charge of complainant's bill that his lots of land aforesaid were, when the pavements hereinafter mentioned were contracted for and done, in the corporate limits of Westport, Missouri (page 1), is admitted in defendant's answer (page 8). (Westport was then an adjacent suburb immediately south of Kansas City, page 410).

The allegation in the "second" charge of complainant's bill that the city of Westport ceased to exist and the real estate aforesaid of complainant was included within the corporate limits of Kansas City, Missouri, on December 2, 1897, by virtue of the extension of the territorial limits of Kansas City made on that day (page 2) is also admitted in defendant's answer (page 8).

Section F.

Westport, a Missouri Fourth-Class City.

The allegation in "second" charge of complainant's bill that the city of Westport, at the times in question, was a Missouri city of the fourth-class (page 1), is admitted in defendant's answer page 8.

Charter Power of Westport.

(1) The mode of enacting a city ordinance by a Missouri city of the fourth-class, is prescribed by sections 62 and 63 of the state legislative act in question. Missouri Laws (session) 1895, page 77.

(2) The power of a city of the fourth class to enact ordinances to improve its streets, is conferred in section 85, of the same page 84.

(3) The whole power conferred upon such a city to pave a street, and to assess the cost thereof against the abutting lands, and how these things were to be done, is contained in sections 88 and 95, inclusive, of the said state legislative act. Id, pages 85 and 86. The last named sections are the provisions alleged to be violative of section 1 of the fourteenth amendment in "fourth" charge of complainant's bill (page 2).

The provisions of the Missouri legislative act of 1895, above referred to, read as follows:

"Section 62. The style of the ordinances of the city shall be: 'Be it ordained by the board of aldermen of the city————as follows:' No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the board of aldermen shall vote for it, and the ayes and nays be entered on the journal; and all bills shall be read three times before their passage. No ordinance shall be revived or re-enacted by mere reference to the title thereof, but the same shall be set forth at length, as if it were an original ordinance. No bill shall become an ordinance until it shall have been signed by the mayor or the person exercising the duties of the mayor's office, or shall have been passed over the mayor's vote, as hereinafter provided."

"Section 63. Every bill duly passed by the board of aldermen and presented to the mayor and by him approved shall become an ordinance, and every bill presented as aforesaid, but returned with the mayor's objections thereto, shall stand reconsidered. The board of aldermen shall cause the objections of the mayor to be entered at large upon the journal, and proceed at its convenience to consider the question pending, which shall be in this form: 'Shall the bill pass, the objections of the mayor notwithstanding?' The vote on this question shall be taken by ayes and nays and the names entered upon the journal, and if two-thirds of all the members elect shall vote in the affirmative, the city clerk shall certify the fact on the roll, and the bill thus certified shall be deposited with the proper officer, and shall become an ordinance in the same manner and with like effect as if it had received the approval of the mayor. The mayor shall have power to sign or veto any ordinance passed by the

board of aldermen: 'Provided, that should he neglect or refuse to sign any ordinance and return the same with his objections, in writing, at the next regular meeting of the board of aldermen, the same shall become a law without his signature."

(Missouri Legislative Act of 1895, page 77).

"Sec. 85. The cities coming under the provisions of this act, in their corporate capacities (are authorized) and empowered *to enact ordinances* for the following purposes in addition to the other powers granted by law:

First. To levy and collect taxes for general revenue purposes on all mixed, personal, and real property within the limits of said city, taxable according to the laws of the state.

Second. *To open and improve streets*, alleys, avenues, and other highways, and to make sidewalks and build bridges, culverts, drains and sewers within the city, and to establish grades for all improvements herein mentioned. Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city. (Laws of Missouri, Session 1895, page 84).

Sec. 86. The cost of bringing to grade all streets, avenues, alleys and other highways, and for the building of bridges, culverts, public sewers and foot-walks across streets, avenues, alleys and other public highways shall be paid out of the general revenue fund of the city.

Sec. 87. For making and repairing sidewalks and sidewalk curbing, the costs thereof shall be levied as a special assessment on all lots and pieces of ground abutting on such improvements, in proportion to the front feet thereof; Provided, that corner lots shall be liable for the extension of curbs and sidewalks to the curb line each way.

Sec. 88. *The cost of paving*, macadamizing, guttering and curbing (where such curb is set out into the street beyond the sidewalk) all streets, avenues, alleys and other highways, or any part thereof or any connection therewith, and repairing the same, and for all excavating and grading necessary for the same (after said streets, avenues, alleys and other highways, or parts thereof or connections therewith, have been first brought to grade, as hereinbefore provided),

shall be levied as a special assessment upon all *lots and pieces of ground upon either side of such street*, avenue, alley, or other highway, or part thereof or connection therewith, *abutting theron*, along the distance improved, in proportion to the front foot.

Sec. 89. The cost of paving or macadamizing the squares and areas as formed by the crossing or meeting of streets and other highways, or parts thereof or connections therewith, shall be levied upon as a special assessment and paid for as follows: Such area shall be divided into parts or portions by lines drawn lengthwise along the middle of eaeh of said streets or highways so intersecting or meeting, and the cost of said parts or portions shall be levied as a special assessment against the block or square contiguous to each, and prorated against the lots or pieces of ground in such block or square abutting on the street improved.

Sec. 90. *The assessments* made for making and repairing sidewalks and sidewalk curbing, *and for paving*, macadamizing, curbing and guttering all streets, avenues, alleys and other highways, and repairing the same, as herein provided, shall be known as special assessments for improvements, and *shall be levied and collected as a special tax, and a special tax-bill shall issue therefor*, and shall be paid in the same manner provided by ordinance. Said special tax-bills may bear interest after thirty days from date of issue at the rate of eight per cent per annum, *and every such (such) tax-bill shall be a lien* against the lot or piece of ground described in the same until the same is paid.

Sec. 91. Before the board of aldermen shall make any contract for building bridges, sidewalks, culverts or sewers, or for paving, macadamizing, curbing, guttering or grading any street, avenue, alley or other highway, an estimate of the cost thereof shall be made by the city engineer or other proper officer and submitted to the board of aldermen, and no contract shall be entered into for any such work or improvement for a price exceeding such estimate; Provided, that no such estimate shall be required for the makings of any local or special repairs.

Sec. 92. All special tax-bills issued for special assessments for paving, macadamizing, curbing, guttering, excavating, grading, construction of sidewalks, and for district sewers, and for any other purpose whatever authorized

by this act, shall be assignable and collectible in any action brought in the name of the city to the use of the holder thereof; but the city shall not in any event be liable for any cost that may accrue in such action. *Such special tax-bills shall, in any action thereon, be prima facie evidence* of the regularity of the proceedings for such special assessments, of the validity of the bill, of the doing of the work and of the furnishing of the materials charged for and of the liability of the property to the charge, stated in the bill.

Sec. 93. The total cost of paving, macadamizing, curbing, guttering and the necessary excavation and grading for the same, of any street, avenue, alley or square, or other highway or part thereof, may be paid in three annual payments—one-third in one year, one-third in two years and one-third in three years from the date of the issue of the special tax-bills—each payment to bear not to exceed eight per cent interest per annum from date of issue to date of payment; Provided, that the owner of any lot or parcel of ground fronting on such street, avenue, alley or other highway, or square or part thereof improved, shall, within thirty days after the letting of the contract (for such) work, notify the city clerk, in writing, that he desires to pay the same in three annual payments. In such cases the city clerk, engineer or other proper officer shall make out three special tax-bills, which shall be signed by the mayor and attested by the city clerk, each for one-third part of the cost of such work, bearing interest as aforesaid, which rate shall be fixed by ordinance, and deliver the same to the contractor for the work. Each and every tax-bill shall be a lien on the lot or parcel of ground therein described, and such lien shall continue for one year for the maturity of the tax-bills last becoming due, until paid, or until the final determination of any legal proceedings to collect same; but no such suit shall be brought on any such tax-bill until after the maturity of all such tax-bills.

Sec. 94. The board of aldermen may, by ordinance, include in the special assessment the cost of bringing to the established grade any street, avenue, alley or other highway or square or area formed by the intersection or meeting of streets or other highways or part thereof proposed to be improved as herein provided, when in its judgment or opinion the general revenue fund of the city is not in a condition to warrant an expenditure therefrom for bringing the

same to an established grade; Provided, that the resolution declaring such work necessary to be done, and published in some newspaper published in the city, shall in addition to other work of improvement therein provided for, include and describe the work of bringing such street, avenue, alley or other highway or square or part thereof to the established grade. In all cases where such work is authorized by virtue of such resolution, and contracted for in pursuance thereof, the bringing to grade as above described shall be included in the same contract with the other work provided for therein, and tax-bills shall be issued in payment or all said work as may be provided for by ordinance.

Sec. 95. *When the board of aldermen shall deem it necessary to pave*, macadamize, gutter, curb (when such curbing is set out into the street beyond the sidewalk) or otherwise improve any street, avenue, alley or other highway, or any part thereof, within the limits of the city, *for which a special tax is to be levied as herein provided, the board of aldermen shall, by resolution declare such work or improvement necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks*; and *if a majority of the resident owners* of the property liable to taxation therefor *shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvements, then the board of aldermen shall have power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided;* and the finding of the board that a majority of such owners have not filed protest shall be conclusive and final." (The succeeding provisions have and make no reference to street paving or to assessments therefor.) Session Laws of Missouri, 1895, Pages 85–86.

All street paving paid for in special tax bills.

All of the street paving done in Westport was paid in special tax bills levied on lands abutting on the street paved, according to the frontage of such lands. (Page 81 of the printed record.)

SECTION G.

Lands Vacant and Unimproved. The allegation in the "Fourth" charge of complainant's bill, that all of the complainant's real estate, charged with the tax bills in question, is vacant and unimproved, and that the greater part of the other lands fronting on the three street pavements aforesaid was vacant and unimproved at the times in question (Page 2), is sustained by uncontradicted testimony. (Pages 85, 93, 142, 189, 195, 196-197, 207.)

SECTION H.

Complainant's Residence. The allegation in the "Fourth" charge of complainant's bill that complainant was not at any time therein named a resident of said city of Westport, but was at all the times therein named a resident of Kansas City, Missouri, (pages 194-195 also page 10) and the owner of the real estate hereinbefore described is sustained by uncontradicted testimony. See "Section C" *ante* page. 17.

SECTION I.

Denial of Equal Protection. In support of the allegation in "Fourth" charge of the bill (page 2) that complainant was deprived of his property without due process of law, and denied equal protection of the laws offered to resident owners of property in the city of Westport, etc., the testimony of witnesses on this subject was, that the charter provision of Westport allowing resident owners of lands adjacent to a street to protest against and prevent street improvements proposed to be assessed against adjacent lands was construed by the Westport authorities to allow all such residents such right of protest, whether they resided on the street proposed to be improved, or elsewhere in the city, and the practice was to exclude non-resident owners of such lands as having no right to participate in any protest to the Westport authorities against a proposed improvement.

George L. Love, City Clerk (Pages 73–168).

Charles T. Getty, (Page 400).

There is no issue in the testimony on this subject.

Section J.

Specification of Trinidad Lake Asphalt, etc., For The Pavements.

The preliminary resolution adopted by the board of aldermen, declaring that the Board of Aldermen deemed the *Main street* pavement necessary, was as follows:

No. 540.

The Resolutions.

"A resolution declaring the work of paving Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue to be necessary.

Be it Resolved by the Board of Aldermen of the City of Westport, that it is necessary to pave Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue in the city of Westport, to the full width thereof exclusive of sidewalks of legally established width, and the spaces between the outside rails of the street railroad on said avenue, the pavement to consist as follows, to-wit: *a genuine Trinidad Lake asphalt* pavement: the base to consist of broken stone laid on the present macadam of such thickness as to bring said base up to within three inches of the finished surface of the pavement, upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone, upon this base shall be laid a binder course of bituminous concrete one and one-half (1½) inches in thickness, upon this shall be laid a wearing surface one and one-half (1½) inches in thickness, the matrix of which shall be composed of *genuine Trinidad Lake asphalt*; *the whole work to be done in conformity with the plans and specifications therefor on file in the office of the City Engineer*, the total cost of the pavement not to exceed the sum of two ($2) dollars per square yard; the pavement to be guaranteed to endure without the need of any repairs for a period of five years. And the Board of Aldermen hereby declare such work necessary to be done. Adopted March 29, 1897.

G. L. Love, City Clerk." (Page 121.)

The city ordinance ordering and specifying the work for the *Main street* pavement was as follows:

No. 1803.

The Ordinances. "An ordinance to pave Main street from the center line of Thirty-first street, or Springfield avenue, to the south line of Westport avenue.

BE IT ORDAINED by the Board of Aldermen of the city of Westport as follows:

SECTION I. That Main street from the center line of Thirty-first street, or Springfield avenue to the south line of Westport avenue, in the city of Westport, be paved to the full width thereof, exclusive of sidewalks of legally established width and the spaces between the outside rails of the street railroad on said street.

SECTION II. The work shall consist of the materials and be laid in the manner following, viz: The pavement shall consist as follows, to-wit, *a genuine Trinidad Lake Asphalt pavement*, the base to consist of broken stone laid on the present macadam of such thickness as to bring the said base up to within three inches of the finished surface of the pavement; upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone; upon this base shall be laid a binder course of bituminous concrete one and one-half (1½) inches in thickness; upon this shall be laid a wearing surface one and one-half (1½) inches in thickness, the matrix of which shall be composed of *genuine Trinidad Lake Asphalt, the whole work to be done in conformity with the plans and specifications therefor on file in the office of the City Engineer.* The total cost of the pavement shall not exceed the sum of two dollars per square yard, the pavement to be constructed of such material and in such manner that it shall endure without the need of any repairs for a period of five years after the completion thereof." Approved May 5th, 1897, (page 123).

The resolution and ordinance for the *Wyandotte street pavement* are in all respects the same as the resolution and ordinance for the Main street pavement, above quoted, except there is no reference therein to street railway tracks. (Page 171.)

The resolution, ordinance and contract provisions for the *Baltimore avenue pavement* is also the same as the resolution, ordinance and contract for the Main street pavement,

except as follows: Baltimore avenue was then only a dir street (Page 72). The foundation to the pavement thereo was required to consist of a layer of hydraulic cement con crete, 4 in. in thickness, while on Main street and Wyan dotte street the existing macadam thereon was to be used a the base of this asphalt pavement; on Baltimore avenue th binder course was 1¼ in. in thickness and the wearing sur face 1¼ in. in thickness, while on Main street and Wyan dotte street the requirement was that the binder course should be 1½ in. in thickness, and the wearing surface 1½ in in thickness. (Pages 147-154).

Refined Trinidad Lake Asphalt Required.

In each of the resolutions and ordi nances aforesaid is the following provision: "The whole work to be done in con formity with the plans and specifications therefor on file in the office of the city engineer."

(See this provision in the resolution for the Main street pavement, *supra*). (See this provision in the ordinance ordering the Main street pavement, *supra*). (See this provision in the resolution for the Baltimore avenue pavement, page 147). (See this provision in the ordinance ordering the Baltimore avenue pavement, page 148). (See this provision in the resolution for the Wyandotte street pavement, page 171). (See this provision in the ordinance ordering the Wyandotte street pavement, page 172).

The specifications of the work, referred to in this provision of the resolutions and ordinances for the pavements in question as on file in the office of the city engineer, were the same specifications as those next set out, as in the contracts made for the work. (pages 69-70).

The Contracts.

The following are such specifications and the contract provisions, as to the use of Trinidad Lake Asphalt in the Main street and Wyandotte street pavements in question: (pages 128–177).

"Binder Course.

Upon the base as above prepared there shall be spread a binder course of *bituminous concrete* composed of clean broken stone not exceeding one and one-half (1½) inches in their greatest dimension, and an asphaltic cement made *as hereinafter specified*, the parts to be thoroughly heated and then mixed by machinery in the proportion of not less than fifteen (15) gallons of asphaltic cement to one (1) cubic yard of broken stone.

The mixture shall be spread upon the base with hot irons and rakes, and while in a hot and plastic condition, shall be rammed and rolled until it forms a compact and thoroughly bonded binder course of a thickness of not less than one and one-half (1½) inches with an even and uniform surface parallel with and one and one-half (1½) inches below the completed surface of the pavement."

Wearing Surface.

"Upon the foundation thus prepared there shall be placed an asphalt wearing surface not less than one and one-half inches in thickness when thoroughly compressed, which shall be manufactured and laid as follows:

The wearing surface shall be composed of

1st. *Refined* Trinidad Lake Asphaltum.
2nd. Heavy Petroleum Oil.
3rd. Clean, fine sand.
4th. Pulverized Carbonate of Lime.

An asphaltic cement shall be prepared by melting and mixing acceptable quantities of *refined* asphaltum and heavy petroleum oil in the proportions of weight, of one hundred (100) parts pure asphalt to fifteen (15) to twenty (20) parts heavy petroleum oil.

The asphalt wearing surface shall be formed by mixing the materials as above specified in the following proportions:

Asphaltic cement from twelve (12) to fifteen (15) per cent.

Sand from eighty-three (83) to seventy (70) percent.

Pulverized carbonate of lime from five (5) to (15) per cent.

The mixture shall be effected as follows: The asphaltic cement and sand shall be heated separately to about three hundred (300) degrees Fahrenheit. The pulverized car-

bonate of lime, while cold, shall be mixed with the hot sand in the required proportions and to this mixture sufficient asphaltic cement, at the required temperature, shall be added to effect a thoroughly homogenous mixture.

The pavement mixture thus prepared shall be delivered upon the street at a temperature of not less than two hundred and fifty (250) degrees Fahrenheit. It shall then be quickly spread by means of hot iron rakes, in such manner as to insure an even and uniform surface, and to such depth that after having received its ultimate compression, it shall have a thickness of not less than one and one-half (1½) inches.

The pavement shall be ironed and rolled by hand, after which a small amount of hydraulic cement shall be swept over it, and it will then be thoroughly compressed with a steam roller, the rolling to continue as long as it makes an impression on the surface." (Pages 128–177).

The paving composition of Trinidad Lake Asphalt, Sand, etc., for the "Binder course" and the "Wearing surface" of the Baltimore avenue pavement was the same as aforesaid for the Main street and Wyandotte street pavements, but the binder course and wearing surface thereon was to be one and one-fourth (1¼) inches each. (Page 154).

Abundance and Equality of Other Asphalt.

In the "Tenth" charge of the bill it is alleged that there are other good and useful brands of asphalt besides the Trinidad Lake Asphalt (page 5) and in the amendment filed to this charge of complainant's bill it is alleged that the specification of Trinidad Lake asphalt, in the resolutions, ordinances and contracts for the street pavements in question, as the only asphalt authorized to be used in such pavements, is in restraint of interstate and foreign commerce. (page 22).

James B. McGowan, sub agent of the defendant, called as a witness by complainant, testified to the abnndance of asphalt in other tropical countries, and in California and Utah of the United States, and also that these other asphalts

had been used in all the cities of the United States, according to his understanding, and that all refined asphalt was supposed to be the same (Pages 423-424).

Henry A. Wise, called as a witness by complainant, testified: That he was a civil engineer, and had been a civil engineer for 32 years. That he was city engineer of Kansas City, Mo., from the spring of 1896 to the spring of 1900 (Page 461). That Trinidad asphalt and Trinidad Lake Asphalt comes from the Island of Trinidad, a British possession, off the coast of Venezuela. That the Trinidad Lake Asphalt has to be refined to be used in street pavements. These refineries of asphalt are mostly around New York City. As a rule, asphalts are refined wherever they come from; all crude asphalt, unless its purity is such that it does not need refining. Some of the California asphalts are so pure that they do not need refining, but as a rule the asphalts are refined; the organic and inorganic matter is taken out by the purifying process; this is the case with all artificial asphalts that are laid; there is rock asphalt that it does not apply to. Asphalt abounds in deposits in tropical and semi-tropical countries like Venezuela, Cuba, Peru, Mexico and Southern California, and in the rock formations in France, Sicily, Kentucky, Indian Territory, Utah, and various other places probably. Trinidad Lake Asphalt is in the form of a pitch asphalt, and so also is the asphalt in Venezuela, Cuba, Peru, Mexico and Southern California. The Bermudez asphalt, in its crude state, is more pure than the Trinidad Lake Asphalt, and some of the California asphalts are very pure. They are so pure that they have scarcely any organic or inorganic matter in solution, and therefore need less refining in order to get them in shape or condition to pave streets with. After these various asphalts are refined, by that process, they are brought into a state of purity. There is no substantial difference after going through the process of refining; they are practically all alike then (Pages 463-4). Mr. Wise further said it was a part of his duties as city engineer of Kansas City, Mo., to furnish speci-

fications to the board of public works for asphalt pavement in Kansas City, Mo., and that the specifications that were made up for the board of public works while he was in office, were made in his office. That he had visited other cities where they use the other mentioned asphalts in street pavements. There is no substantial difference in their specifications for street pavements with these other asphalts, in the specified composition with other material in the pavement. The asphalts, other than Trinidad Lake Asphalts, above named, have been used successfully from 5 to 8 years in New York City, Buffalo, Detroit, Cincinnati, Indianapolis, Minneapolis and Omaha; that he knew this from his own knowledge. That he was a railroad engineer and mechanical engineer before 1896, when he became city engineer of Kansas City, Mo., (Pages 464-5).

There was no other testimony on this issue.

Section K.

Defendant's attempted monopoly, and its monopoly of Trinidad Lake Asphalt pavement in Westport and Kansas City, Missouri.

Defendant laid 15 or 16 asphalt pavements in Westport, Missouri, under as many different contracts, the last, or among the last of which pavements, were the Main St., Baltimore Ave. and Wyandotte St. pavements here in question, were ordered or contracted for by Westport (Page 497). Nearly all the street pavements in Westport were laid in 1897 (Page 501), the year of the pavements in question.

"Trinidad Lake Asphalt" was specified in the Westport resolutions, ordinances and contracts as the asphalt required to be used in all of the 16 asphalt pavements ordered and contracted for by the City of Westport. (Pages 68-69 70-71, 498).

None of the resolutions or ordinances aforesaid (specifying "Trinidad Lake Asphalt") were written in the West-

port offices (Pages 503-515). They were generally brought out to Westport already prepared, by Jim McGowan, Getty or Norris, sub-agents of defendant (Pages 494-495). J. K. Griffith, one of the defendant's attorneys, called by complainant as a witness, admitted that he wrote the resolutions and ordinances for 2 of the 3 street pavements in question. (Page 45).

The defendant is the only contractor who laid an asphalt street pavement, or received a contract for an asphalt street pavement, in Westport, Missouri (Pages 97, 491-497).

The Parker-Washington Co. put in a lower bid than defendant's accepted bid for the first of the pavements here in question, to-wit: The Main St. pavement. Defendant's agents, Mr. Scarritt and Hugh J. McGowan, appeared before a committee of the board of aldermen of Westport and opposed the award of the contract to the Parker-Washington Co., the position taken by them being that the Parker-Washington Co. could not furnish "Trinidad Lake Asphalt," called for in the resolution and ordinance. And it was on this ground that the lower bid of the Parker-Washington Co. was rejected for the Main St. pavement, and the contract therefor was awarded to the defendant by the committee of the board of aldermen of Westport (pages 88-89-114).

The first specifications for asphalt street paving in Kansas City, Missouri, was simply "Asphalt on Concrete." Subsequently the specification was "Trinidad Lake Asphalt" (page 463).

The Barber Asphalt Paving Company never laid any street pavements in Kansas City or Westport except with Trinidad Lake Asphalt (pages 69-70-71, 405, 413).

The defendant has, since the year 1891, maintained an agency in Kansas City, Missouri, to importune and influence the city authorities of Kansas City and Westport to order and contract for asphalt street pavements with specification of "Trinidad Lake Asphalt" as the asphalt to be used in

such pavements. (See references pages 42 to 45 hereinafter).

Defendant has laid about 100 miles of asphalt street pavement in Kansas City, Missouri, (page 104) nearly all of the asphalt street paving in Kansas City (pages 463, 466, 99, 101.)

The defendant, Barber Asphalt Paving Company, laid all of the asphalt street paving in Kansas City previous to 1896, except possibly on one street (McGee street) (page 463). *In the fall of 1896 the* Parker-Washington Company bid for several asphalt paving contracts in Kansas City under the "Trinidad Lake Asphalt" specifications, one of which was Washington street, from 9th street to 13th street (4 blocks) and also Lawton Place (a half block) which is a small court between 13th and 14th streets east of Washington. This company was the lowest bidder, received the contracts and did the work of paving these two streets. Both of these pavements did not make over ¼ of a mile of pavement. This was all of the asphalt street paving done by the Parker-Washington Company in Kansas City, Missouri. They bid on a number of other streets for the asphalt pavement thereon having the "Trinidad Lake Asphalt" specification, and their bids were in each case lower than the Barber Asphalt Paving Company, but they did not receive the contracts therefor (page 466). The reason why these contracts were not given to the Parker-Washington Company was that the Parker-Washington Company was deemed an irresponsible company and could not furnish the "Trinidad Lake Asphalt" (page 467). This claim was made by the members of the public improvement committee, by aldermen in the common council, and by Hugh J. McGowan and the attorneys representing the Barber Asphalt Paving Company. The Parker-Washington Company paved a number of streets in Kansas City with brick. There was never any objection to their responsibility or failure to confirm their contracts, excepting when they bid on Trinidad Lake Asphalt pavements (page 468).

The Parker-Washington Company shipped a plant to Kansas City in 1896 for asphalt street paving—they still have it. They ceased bidding on asphalt street pavements in Kansas City, Missouri, at the close of 1897 (pages 468-469). After that they bid on brick pavements in Kansas City, Missouri and the asphalt pavements in Kansas City, Kansas, (page 469).

The Parker-Washington Company tendered a bond with their bids made in Kansas City, Missouri, for street paving with Trinidad Lake Asphalt, which bond was approved by the comptroller of Kansas City, Missouri, whose duty it was to approve such bonds (page 469).

In 1897 a committee appointed by the lower house of the common council of Kansas City, Missouri, investigated the ability of the Parker-Washington Company to furnish Trinidad Lake Asphalt. The representatives of the defendant, Hugh J. McGowan and W. C. Scarritt, were there, and participated in the examination (pages 470, 485). J. H. Harkless also (page 486). The claim there made by Mr. McGowan, and his attorneys, was that the Parker-Washington Company was not able to secure or procure Trinidad Lake Asphalt, and did not use it when they paved Washington street and Lawton Place (page 470). The committee of the common council reported that the Parker-Washington Company could not furnish Trinidad Lake Asphalt; and that Washington street and Lawton Place were not paved with Trinidad Lake Asphalt exclusively (page 470). McCormick, the president of the Parker-Washington Company, or one of its officers, was put on the witness stand and examined by the committee as to where he got his asphalt. The attorneys for the Barber Asphalt Paving Company did most of the questioning (page 485). Hugh J. McGowan was continually asserting the Parker-Washington people could not procure or produce Trinidad Lake Asphaltum, and he contended that such asphalt as they did have must be land asphalt and not lake asphalt (page 486). He repeat-

edly said they could not get Trinidad Lake Asphalt unless they got it from his company (page 487).

James H. Harkless, an attorney-at-law, of the firm of Harkless, O'Grady & Crysler in Kansas City, Missouri, filed three injunction suits in the circuit court of Jackson county, Missouri, at Kansas City, in the names of Joseph Lorie, Jennie Henrici and George Eberle, respectively, to prevent Kansas City from letting contracts to the Parker-Washington Company for paving 17th street, Park avenue and Tracy avenue under "Trinidad Lake Asphalt" specifications (pages 424-5). The petition in such suits each alleging among other things as ground for such injunction, the following:

"That the defendant, the Parker-Washington Company although it has bid upon said work under the specifications requiring the pavement to be laid with Trinidad Lake Asphaltum, it does not intend or purpose, and will not, if permitted to do the said work, lay the said pavement, or the matrix thereof, with Trinidad Lake Asphaltum; that the said defendant has no refined Trinidad Lake Asphaltum on hand, or has not a sufficient amount of that material with which to do the work aforesaid; that the said defendant, the paving company, has, by certain false affidavits and statements, misled and deceived the engineer of Kansas City, and the members of the common council of said city, and has, by reason of such false affidavits and statements, caused the city engineer and the members of the common council to believe that the said company has in its possession a sufficient amount of Trinidad Lake Asphaltum to execute the work aforesaid, and that it is the intention and purpose of that company so to do. Plaintiff states that the said engineer and members of the common council have not made any examination, *and have not the appliances in their possession with which to determine whether or not the asphaltum in the possession of the said defendant paving company, and with which it intends to pave the avenue aforesaid, is refined Trinidad Lake Asphaltum*" (pages 427-428).

The above quotation is from the petition in the George Eberle injunction suit aforesaid to prevent the work of pav-

ing Tracy Avenue being let to the Parker-Washington Company. It was stipulated that the petitions in the Henrici and Lorie cases (to prevent the paving on other streets being let to the Parker-Washington Co.) are the same as the petition in the George Eberle case, above quoted from, and that the said petitions shall be so considered as parts of this record without being copied herein (pages 453).

Mr. Harkless was called and examined as a witness by complainant and was repeatedly asked for whom he brought these suits, and who paid him his fee therefor. After declining, several times, to answer any of these questions, finally said he thought he brought these suits, and possibly one or two other like suits, because the Parker-Washington had attempted to get a contract for a pavement in front of a 33⅓ ft. lot that he owned on a different part of Tracy Av., under a different ordinance and different contract than that in the Eberle suit. He was not sure, but thought, he had filed a suit in his own name to prevent the pavement in front of his own lot. Could not say who paid the costs or furnished the bonds in these suits filed by him against the Parker-Washington Co (pages 425-434).

Wm. Henrici, husband of Jennie Henrici, called by complainant, testified: That the Jennie Henrici suit was allowed to be brought pursuant to a request of Mr. Griffith, of Scarritt, Griffith & Jones, the defendant's attorneys in this case; also that there was no communication whatever between Jennie Henrici, the plaintiff in the suit, or himself, and James H. Harkless, who acted as attorney in such suit (page 446).

A. M. Allen, deputy clerk of the Jackson county circuit court, called by complainant as a witness, produced the appearance docket showing the filing of these three suits, and Harkless, O'Grady & Crysler as attorneys of record for the plaintiff in each case (pages 455-459); also that the cost was "paid by plaintiff on June 8th, 1898," in each of the three cases (pages 455-456-459); the amount of the costs there recited as paid by the plaintiff in the Lorie case being

$57.15 (page 455); the amount recited as paid in the Geo. Eberle case by the plaintiff being $60.95 (page 456); and the amount of the cost there recited to have been paid by the plaintiff in the Henrici suit was $62.75 (page 459). In the Eberle suit there was a pencil memorandum, "Bill, S. G. & J. by request," in the court fees account kept in this book (referring to Scarritt, Griffith & Jones). (Pages 456-457-459). "By Mr. Scarritt—Q. That 'S. G. & J.' is opposite the sheriff's bill for $43.00, is it not? A. Yes, sir. Q. Scarritt, Griffith & Jones were the attorneys for the sheriff at that time, were they not? A. Well, I could not answer that question, for I do not know whether they were or not" (page 457)*. In the Henrici and Lorie cases the entry was "bill to plaintiff's attorney, 6-7-98" (pages 458-459). The entry, "bill to plaintiff's attorney, 6-7-98," in the other two cases is also written opposite the item of sheriff's fees in the bill of costs (pages 458-459).

Geo. Eberle and Joseph Lorie (the plaintiffs in the other two injunction suits), were called and examined as witnesses by the complainant. They both testified that they did not pay any costs in those suits (pages 448-450 incl.) Mr. Lorie, the record shows, signed as a surety for the Barber Asphalt Paving Co. the contract with Westport for the Baltimore Ave. pavement in question (page 158).

Mr. Wm. C. Scarritt, who was examined as a witness on this issue by the complainant, previously to the above

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**No further attempt was made by defendant to show by this witness, or by any witness, that Scarritt, Griffith & Jones were ever attorneys for the sheriff. By the Missouri statute in force then and since 1893 (Laws Missouri, 1893, page 168) in Jackson county the court fees taxed and collected in these three cases as due the sheriff, did not belong to him and were not payable by the clerk to him, but to the county. The clerk would have been guilty of a misdemeanor to have paid these fees to the sheriff or to have disposed of them otherwise than into the county treasury. Sections 5, 6, 7 and 8, Laws 1893, pages 170-1.*

named witnesses testified: That the Parker-Washington was a rival bidder of defendant in Kansas City for asphalt street pavements under the "Trinidad Lake Asphalt specifications," and that Kansas City had been prevented from letting contracts for street pavements to the Parker-Washington by the suits brought in the circuit court by property owners. On further examination he declined to answer questions of complainant as to whether the Barber Asphalt Paving Co., or its representatives, had anything to do with the suits in the circuit court opposing the Parker-Washington getting contracts they bid on. He also declined to answer complainant's question as to whether the Barber Asphalt Paving Co. had anything to do with resisting a mandamus proceeding instituted in the Supreme Court of Missouri by the Parker-Washington Co. concerning another asphalt pavement bid for, and declined to answer whether the Barber Asphalt Paving Co. employed attorneys to resist that mandamus proceeding (pages 116-117). He admitted having appeared with Hugh J. McGowan before the Westport authorities and having opposed the award of a paving contract to the Parker-Washington Co., on a lower bid of the Parker-Washington Co (page 114).

J. B. McGowan, (employee of Hugh J. McGowan,) called as a witness by complainant, declined to answer complainant's question as to whether he had contested the ability of the Parker-Washington to lay Trinidad Lake Asphalt (page 421)

Chas. F. Getty, (employee of Hugh J. McGowan,) called by complainant and replying to complainant's questions as to other contractors bidding for asphalt pavement in Kansas City and defendant's opposition to them, said, "Yes, there were fellows come in here, make a straw bid and bob out again." "We tried to keep them out when they came in and tried to get work *we had procured* and they had some cock and bull story and then it was legitimate to keep them out." "Bidding on things they could not supply" (pages 443-4).

Section L.

Why the street pavements were ordered and why Trinidad Lake Asphalt Was Specified therefor.

Hugh J. McGowan was the agent of defendant to procure orders and contracts of Kansas City and vicinity for asphalt street paving from some time in the year 1891 to 1898, inclusive, and he, or his employees, procured the orders and contracts from Westport for the paving in question in 1897 (pages 409-410, 437-438, 442, 68).

Hugh J. McGowan was experienced in municipal politics when he went into the employ of the defendant in the year 1891. He began as a policeman in Kansas City in 1880. After six years service on the police force he was, in the fall of 1886, elected marshal of Jackson county (the county in which Kansas City and Westport were situated) for a term of two years. In the fall of 1888, he was elected to a second term as county marshal (page 419). It was in 1891, shortly after this career of ten years in public office at Kansas City, Mo., that he went into the service of the defendant as its agent to procure orders and contracts for asphalt street paving from Kansas City and vicinity for defendant (pages 410, 442).

He and his assistants had and exercised a positive influence with the municipal boards of Kansas City and Westport as to when a street should be paved, and with what materials, and in what manner it should be paved (pages 473, 478, 488, 496; see also references hereinafter).

In 1896 and 1897, efforts were made in the board of public works and common council of Kansas City, Mo., to have open specifications for asphalt paving, and to do away with specifying the use of asphalt from a particular place. The Barber Asphalt Paving Company's representatives, Hugh J. McGowan and James B. McGowan, opposed the proposed open specifications and insisted on a continuation of the Trinidad Lake Asphalt specification for street paving in Kansas City. The proposal to have open specifications of

asphalt for street paving in Kansas City failed (pages 471-2. Also pages 474, 476-477, 482. Also pages 483-484-485).

The defendant had a construction office in Kansas City, Mo., (page 411). At this office was a bookkeeper, cashier and superintendent (page 412). This superintendent signed the bids (page 412) and contracts for the pavements, but had nothing to do with procuring the contracts (pages 436-437).

Hugh J. McGowan had no connection with the defendant's construction of the pavements, or with the construction office (page 435). He rented and maintained a separate office at his own expense and hired and paid three men, James B. McGowan (brother of Hugh McGowan), Chas. Getty and Wm. Norris, who assisted him in his work of procuring contracts from Kansas City and Westport for asphalt street paving (pages 411 to 413, incl.; 415 to 418, incl.). No book account of this expense was kept (pages 416, 440-441). James B. McGowan, who testified to all the above facts, declined to state the amount of such expense; also the nature or amount of the compensation paid by Hugh McGowan to his said assistants for their work in aiding him to procure for defendant contracts for street pavements (pages 416-417-418). Chas. Getty, another witness, refused to tell what his compensation from Hugh J. McGowan was for assisting in procuring contracts (page 440). Hugh J. McGowan was in Kansas City, Mo., from the beginning of his agency in 1891 to 1898, inclusive of the times of the pavements here in question, but before this suit was brought he moved to Indianapolis, Indiana (page 112), and during the time of the taking of the depositions in this case was in Kansas City only on short and infrequent visits (page 424).

The position, power and duties of Hugh J. McGowan, as agent of the defendant, are proven by testimony of Mr. Scarritt, defendant's solicitor, and by Mr. McGowan's employees, taken by complainant, as follows:

Mr. W.C. Scarritt testified that Hugh J. McGowan was the agent of the defendant, and of the scope of his agency

said: "I think his duties covered the whole *minutia* of secu ing contracts for work" from "both public and private pe sons who desired asphalt pavements" (page 109).

James B. McGowan testified as to the relations of Hug J. McGowan to the defendant, as follows: "I know he ha charge of Kansas City, Mo., and I think of the state of Mis souri." * * * "He was the agent of the Barber Asphal Paving Co." Q. "Their general representative you mean?" A. "Yes, sir." "Q. That is, before 1898, during 1897?" A. "Yes, sir." Q. "And of course that included Westport, Missouri?" A. "Yes, sir" (page 409). He began in the service of the defendant in 1891 or 1892, as agent, and with "the same powers as I presume he exercised" so far as Kansas City and Westport were concerned (pages 410-411).

The plan [redacted] method employed by Hugh J. McGowan, and his assistants, to procure contracts for defendant for street paving in Kansas City and Westport was as follows: When McGowan, or his assistants, determined to secure an order and a contract for defendant to pave a street, or part of a street, in Kansas City or Westport, a petition was prepared, which was in form of a request of residents who owned abutting lands on the street pavement proposed, asking the council of Kansas City or the board of aldermen of Westport, to adopt the required preliminary resolution declaring it necessary that the named street, or part of a street, should be paved with asphalt, and that such preliminary resolution provide that the asphalt to be used therein be "Trinidad Lake Asphalt" or "genuine Trinidad Lake Asphalt;" this petition the defendant's agents (McGowan or the assistants he employed) would circulate among such resident owners, and when signed by such majority of resident owners as they could get, would be taken by the defendant's agents, aforesaid, to the common council of Kansas City, or the board of aldermen of Westport, the municipal authority having the right to declare necessary or to order the proposed street pavement (pages 68, 73, 82, 98, 109, 411, 413, 418, 422-423, 435-436, 438, 444, 489).

(See the petitions for the three pavements in question, pages 120-145-169).

"When they (McGowan's assistants) thought a street could be paved they went out and got the names of the resident property owners. Non residents did not count." (Chas. Getty, McGowan's employee, page 435).

No action was ever taken by the board of aldermen of Westport to pave a street except upon such a petition to them, presented by the agents of the Barber Asphalt Paving Company (pages 68-499-500).

Whenever such a petition was presented by Mr. McGowan, or his assistants the common council of Kansas City, or the board of aldermen of Westport, always adopted the proposed resolution declaring it necessary that the street, or part of a street, be paved; and such resolution always provided that such pavement be an asphalt pavement, and that the asphalt used in such pavement be "Trinidad Lake Asphalt" or "genuine Trinidad Lake Asphalt," etc., exactly as requested in such petition. (Pages 74-82-104-439-494-5-6-500). And no question was ever asked as to how the signatures to one of these petitions were obtained. (Pages 501-2)

The same course of proceedings ~~were~~ was had and led to the municipal proceedings and to the procurement, for the defendant, of the contracts, for the three pavements complained of in this case (Pages 68-104-437-438).

The petition for the Main street pavement was filed March 29th, 1897, (page 120); the resolution declaring the work of paving Main street necessary was adopted by the board of aldermen the same day (pages 118-121-122). The petition to pave Baltimore avenue was filed June 14th, 1897, (page 141-146); the resolution declaring the work of paving Baltimore avenue necessary was adopted three days later, June 17th, 1897, (page 147); (whether this was or was not, the first meeting of the board of aldermen after the filing of the petition for the Baltimore avenue paving was not shown). The petition for the Wyandotte street pavement was filed

July 15th, 1897, (pages 167-169-170); the resolution declaring the work of paving Wyandotte street necessary was adopted the same day (page 171).

The Westport city authorities were cognizant of the following matters at all of the times in question in this case:

(1) They knew that the Barber Asphalt Paving Co. then and *theretofore had a* monopoly of Trinidad Lake Asphalt pavement in Westport, Mo. (Pages 69-104-497).

(2) They knew Hugh J. McGowan, and his assistants, and of their agency to procure for the defendant municipal orders and contracts for asphalt street paving. (Pages 415-491-2-3).

(3) They knew that the petitions presented for asphalt street paving with Trinidad Lake Asphalt were procured by the agents of the Barber Asphalt Paving Co. (Page 502).

The Westport charter (Sec. 95) authorized resident owners of land abutting on a proposed street improvement to protest against the necessity of such improvement and thereby defeat a resolution of the board of aldermen which proposed to levy the cost thereof against the abutting lands, but no petition was required or authorized, as the basis or preliminary to any action of the board of aldermen adopting the required resolution for a street pavement. (Pages 48-73).

After the time for protests of residents against a proposed street pavement, as provided in the respective charters of Kansas City and Westport, the common council of Kansas City, or the board of aldermen of Westport, would follow the adopted resolution with an ordinance of the city ordering the asphalt pavement, and with a contract for the work, providing that the asphalt used therein be of "Trinidad Lake Asphalt" or "genuine Trinidad Lake Asphalt," as in the resolution aforesaid. (Pages 67-436-489-496-500).

McGowan and his assistants attended the meetings of the common council of Kansas City, and the board of aldermen of Westport when the asphalt paving proceedings, inaugurated by them, were before such municipal bodies, and continued their attendance at such meetings from their pre-

sentation of a petition for a proposed street pavement until the contract was consummated by the final ordinance confirming the contract (pages 71-98-112-414-436 to 439-472-489-491-492-495). They did not speak to the common council or board of aldermen, as a body, or in the sessions of these bodies, but they spoke to the members thereof, singly, before and after the sessions of such municipal bodies. (Pages 414-415-439-472-473-478-479-480-488 489-490-492-493).

At Westport the agents of the defendant (McGowan or his assistants) circulated among the aldermen before and after the sessions of the board of aldermen and treated them in the saloons of Westport (pages 492-3).

There was a Yost typewriter machine kept in the Westport City Clerk's office for writing resolutions and ordinances of the board of aldermen. There was no other typewriter in the Westport offices. (Page 502). The ordinance levying the assessments for street paving were all written on this machine, but none of the resolutions or ordinances of Westport ordering asphalt street pavements (which specified Trinidad Lake Asphalt) were written on this machine. These were written on a different typewriter. (Pages 503 to 515). The pages of the asphalt paving ordinances were fastened together by an eyelet fastener never used in the Westport offices. (Page 505).

The resolutions and ordinances for the asphalt pavements were not drawn in the Westport offices but were generally brought out there already prepared by Jim McGowan, Getty or Norris—Hugh McGowan's employees (pages 494-5).

The resolutions and ordinances were adopted by the board of aldermen as prepared by defendant (page 503).

J. K. Griffith, one of the defendant's attorneys, called as a witness by complainant, admitted that he wrote the resolutions and the ordinances for the Baltimore Ave. and Wyandotte St. pavements in question (page 45). These resolutions and ordinances specified Trinidad Lake Asphalt

as the asphalt required for these pavements (pages 147-171). There were other companies in the field for street paving in Kansas City, with other paving materials (pages 101-99).

The engineer of Westport advertised for bids for asphalt street pavements in question (pages 67, 88).

Each of the contracts for the pavements in question recite the following as the premise for the award of the contracts to the defendant:

"That whereas, the said party of the first part is the lowest and best bidder," etc. (pages 124-149-173).

Section M.

As to the need of the three Pavements.

Main St., Baltimore Av. and Wyandotte St. (paved streets in question) are consecutive and parallel streets, north and south streets, in Westport (pages 188-189).

The center of 31st St. (Springfield Av.) was the south boundary line of Kansas City, and the north boundary line of the city of Westport (page 195), Westport then being a southern suburb of Kansas City (page 410). The east and west streets through Westport were numbered from 31st St. to 48th St.; 31st St. (Springfield Av.), the first east and west street of Westport, is the north end of the Main St. pavement in question (pages 195-352). 33rd St. is the second east and west street from the north side of Westport and is the north end of the Baltimore Ave. and Wyandotte St. pavements in question (page 195). Westport Ave. (a cross street) is the south end of the three pavements in question (pages 195-348). There are seven cross streets through the paved district in question, to-wit: 33rd, 34th, 35th, 36th, 37th, 38th and 39th streets and Westport Ave (page 195). The north end of the three pavements is two miles and the south end is three miles from the business center of Kansas City, Mo (page 189). There is a mile and a half of intervening residence property—some of it rather rough (page 189), intersected with deep ravines and draws (page 190).

Most of the lands fronting on the three street pavements were in 1897 and are yet vacant. Whole blocks then and yet without a single house thereon (pages 84-85-93-142-189-195-196-207) and along most of the pavements on Baltimore Av. and Wyandotte St. there ~~is~~ are yet no sidewalks (pages 196-7-8).

Main St. is the principal street from Westport into Kansas City (page 190). The street railway from Kansas City through Westport was on this street (page 205). Main St. was macadamized by the county court in 1887 from 31st St. to 39th St. (pages 85, 374, 377) which part of the paving district in question, 31st St. to 39th St., was not then in the limits of either Westport or Kansas City, but was between the two cities (pages 193-196-220-352-353). The remaining part of Main St., covered by the asphalt pavement in question, the south block thereof, to-wit: from 39th St. to Westport Ave., was paved with a 12-inch macadam pavement and the cost thereof charged to the abutting lands by the city of Westport, in the year 1892 (pages 72-84-93-198). On the east side of this block of macadam pavement was the street car barn and some small store buildings. On the west side thereof are the complainant's vacant lots—lots 1 to 5 inclusive, in block 45, and on the lots south of complainant's lots was a street car used as a confectionery. There was not a residence on either side of Main St. in this block (pages 74-82-83-84-196-198-296-7-8 and top of page 238). The macadam pavement on that part of Main St., from 31st St. to 39th St., laid by the county court in 1887, was much worn and in need of replacement in 1897, when the asphalt pavement thereon in question was laid by defendant, but the macadam on that block or part of Main St., from 39th St. to Westport Ave., aforesaid laid in 1892, by authority of the city of Westport, Mo., and charged to the abutting lands, was a good and substantial pavement, in no need of repair or of being replaced by another pavement for the public use or for safe and convenient travel thereon in 1897, when the asphalt pavement in question was ordered

(The record reference of defendant's witness Macadam relate to the 31st St. and do not relate to the block of macadam laid by Westport on Main St. between 39th St. and Westport Ave. or to the macadam laid by Westport on Wyandotte St.).

laid on Main St. As to this block from 39th St. to Westport Ave. on Main St. in 1897, to change the surface thereof from macadam to asphalt was a mere matter of taste (pages 72, 84, 93, 198, 284, 345, 347-348, 349, 386, 387).

Wyandotte St. was much traveled over in 1897, when the pavement in question was laid thereon. This part of Wyandotte St. was macadamized and the cost thereof assessed against the abutting lands by the city of Westport in 1893 (pages 72, 84). This macadam pavement on Wyandotte St. was a good and substantial pavement, and in no need of repair or replacement for safe and convenient travel thereon in 1897, when the asphalt pavements in question were ordered, contracted for and laid thereon (pages 72, 84, 93, 197-198, 284, 345, 347-348 349, 386-387). There was a protest of resident owners against the asphalt pavement in question thereon but not by a sufficient number to defeat the proceedings therefor (page 168).

Baltimore Ave. was parallel to and between Main St. and Wyandotte St., 280 feet west of Main St. and 260 feet east of Wyandotte St. (pages 188-189). In 1897, when the pavement in question on Baltimore Ave. was declared necessary, ordered and done, there was, as stated in preceding paragraph, a good and substantial macadam pavement on the whole of Wyandotte St. parallel thereto (see references in preceding paragraph) and the Main St. pavement in question was then in course of construction (pages 124, 135, 147, 149, 161). Baltimore Ave. was a dirt street in Westport until 1897, when the asphalt pavement in question was laid thereon (page 72). There were then only 12 houses on both sides of the mile of pavement in question (pages 84, 142, 281).

The pavement, on each of the three streets, is a mile long (pages 84, 189, 195, 219). The amount paid defendant in tax-bills for these pavements, respectively, was as follows:

For Main street, $47,019.67; for Baltimore avenue, $24,512.00; and for Wyandotte street, $31,908.54 (page 12).

The orders and contracts for the three improvements in question were all within four months time:

The Main street pavement was contracted for May 17th, 1897, (page 124). The Baltimore avenue pavement was contracted for July 26th, 1897, (page 149). The Wyandotte street pavement was contracted for Sept. 11th, 1897, (page 173).

Section N.

Benefit of the Pavements to Complainant's Property.

Defendant called no witnesses upon any of the matters hereinbefore recited. Defendant alleged in its answer that the lots or tracts of land fronting on each of said streets within the distance improved are in one of the most fashionable and rapidly developing locations in Kansas City, Mo., and were enhanced and increased in value by reason of the pavement of the said street with asphalt, directly in proportion to the frontage of each lot, or tract of land upon such improvement, and to an extent greater than the amount charged against such lot or tract of land to pay for such pavement (page 10). This was put in issue by complainant's general replication (page 14). The testimony elicited on such allegations of the answer was as follows:

GEORGE L. LOVE, City Clerk, (called by complainant on other issues) on cross-examination by Mr. Scarritt, testified:

There were some handsome residences on Main street when the pavement in question was laid thereon, (about twelve of which were named by the witness).

A. W. Armour and Mr. Kirk Armour and Mr. Ed Smith resided on 35th and Walnut streets, (a block east of Main street). These are some of the handsomest residences

in the city and they use this Main street passing backward and forward from their homes to Kansas City (pages 76-7).

There were several good residences on Baltimore avenue before the pavement was laid, and there are some "nice residences" built since then.

South of 36th street Wyandotte street is built up with a good class of buildings—there is one house north of 35th street. Speaking generally, this district is one of the handsomest residence districts of Kansas City (pages 77-8).

RE-DIRECT EXAMINATION.

I heard a man talking about it—if he could get a livery stable in there (39th and Main), he would like mighty well to get it. I would not put a livery barn there (page 83). I could not suggest an improvement there that would pay 2 per cent on the investment (page 84).

There were 12 or 13 houses fronting on Baltimore avenue before the pavement in question; a large portion of the street was vacant and unimproved at that time (pages 85-142).

RE-CROSS EXAMINATION.

It is mostly vacant yet (page 189). Twenty-five new houses fronting on Baltimore avenue have been built since the pavement. "They are nice residences," not all very fine, but I believe the restrictions require $4500. That section has developed rapidly. New residences are being built on streets paved with asphalt very largely. I do not know as to the necessity of paving streets in order to get people to live out there. People like to live out there (page 142).

RE-DIRECT EXAMINATION.

I think C. E. Finlay Real Estate Co., and its connections have built the larger portion of these new houses. I suppose they have been built for the purpose of selling them. Mr. Finlay lives in Westport but not on Baltimore avenue. I do not know anything as to the cost of those houses only in relation to the selling price of them. I do not know only the price he held on them. The houses I was speaking of were on Baltimore avenue, north of 38th street, between 37th and 38th streets. There are about 9 or 10 of these houses. I do not know just what is meant by fashionable street. I think there are some very excellent people that

have bought property built in that way (page 143). I know Dr. Barber has bought one, he is the head of a school of Osteopathy here. I do not know about this running a fraudulent school of Osteopathy. I do not know whether he is the most excellent acquisition to that neighborhood. I did not say these people were the most excellent. I said some most excellent people bought houses on that plan. In my business I left Westport and came to Kansas City and have been away from there in my business relations and do not keep my business acquaintances as before, but I notice the people who get off and on the cars that come from that portion and they look to be very respectable people. I think I heard of some trouble Dr. Barber had. Some of the property has been bought outright. It is a matter of opinion whether it is a detriment to the value of the property to have people who buy houses on the installment plan mortgage them back, instead of having people who build houses according to their own selection. I think a man who has a good position, reasonably permanent, with a good salary, if he buys him a home I think he would pay for it out of his earnings or salary, and it is a very good thing. I do not like to testify on the point as to whether that class of population add to the value of the property. The property has advanced in price very materially since it was built up (page 144). In speaking of C. E. Finlay and his purchase of property in the vicinity in question the witness said: "Well, he never paid any more than he had to" (page 167). Some of the buildings and places about which Mr. Scarritt has questioned me are more than half a mile south and west of complainant's property (pages 193-4). The cable railway runs out Main street, the main thoroughfare from Kansas City (page 194).

J. C. TATE, (called by complainant on another issue).

CROSS EXAMINATION BY MR. SCARRITT.

Six handsome residences fronting on the Main street pavement in question; one handsome residence costing $25,000 on Baltimore avenue, the Westport Baptist church on Baltimore, and on Wyandotte street, there were quite a number of good houses and a number have been erected thereon in the last two years, but the course of development out in that country is all of it very slow (page 94). Balti-

more avenue was improved generally, and the property fronting thereon, by this paving. It was a dirt road before this was put down; since then it has been quite a beautiful thoroughfare (pages 94-5). Wyandotte street has been benefited considerably by the asphalt paving (page 95).

RE-DIRECT EXAMINATION.

Property is selling slowly out there (page 95). There is one piece that has sold for more since the paving—a very high, sightly place on Main street, the Taylor property. The complainant's property is worth from $20 to $30 a foot less than the Taylor property.

Finlay bought property between 37th and 38th streets on Baltimore avenue since the asphalt pavement was laid for $25 a foot, which had previously been sold some seven or eight years before at about $44 per foot. There was a general depreciation of real estate in Kansas City after the Kansas City boom was over (page 96). There has been a great deal of paving done in residence neighborhoods and that has made quite a large supply of vacant property on well paved thoroughfares (page 97). The property in Hyde Park, out where complainant's property is situated, depreciated less than nearly any part of the city, from the lapse of the boom. They had the best system of transportation out there in the city. You can get out there better than to almost any other part of the city. This street car system, more than anything else, maintained the values out there (pages 101 and 102).

E. H. PHELPS, testified:

DIRECT EXAMINATION BY MR. SCARRITT, APRIL 12, 1900 (page 210).

Real estate agent 18 years in Kansas City. Familiar with the value of property in Hyde Park and Westport for 10 years, more especially (page 210). Familiar with the Main street pavement in question and think the lots fronting on this part of the street benefited much more than the cost of the pavement (page 211). I think they are worth $8 to $10 per front foot more. All lots benefited equally,

just in proportion to size of the lot. In other words, each lot would be benefited specially just in proportion as the frontage of each lot bears to the frontage of the ground abutting on the pavement (page 212).

(His testimony of benefit of the Baltimore avenue and Wyandotte street pavement to abutting lands the same as the testimony aforesaid of benefit to abutting lands on the Main street pavement, page 214, 216).

ON CROSS EXAMINATION BY COMPLAINANT, SAID.

Main street is a street running through Westport into Kansas City. Baltimore avenue and Wyandotte street come to a dead end at 33rd, the north end of the pavements. Travel from there into Kansas City has to go east one block to Main street or west to Broadway or Penn (pages 218-219).

The three streets in question, Main street, Baltimore avenue and Wyandotte street are parallel and consecutive streets, Baltimore avenue being 250 or 275 feet west of Main street and Wyandotte street being about the same distance west of Baltimore avenue. Each pavement is about a mile long (page 219). Property in that neighborhood during the height of the boom in 1887 would probably have sold for $15.00 per front foot. Did not remember that Mastin paid $40 a front foot for property out there in 1886 or 1887. House costing from $2,000. to $2,500. built on 35 feet of ground out there would rent for 8 per cent. gross. The money to build with can be borrowed at 6 per cent. Complainant's land is worth $35 or $40 a foot (page 229). Property opposite complainant's sold since the pavements, and within a year, for $28 per foot (page 230). Have been a witness very frequently in city condemnation proceedings to take lands for streets. Employed by parties to look up the values and then come in and testify. Certainly expect something beyond witness fees in this case. It is purely a business transaction (page 232-233).

WILLIAM S. WOODS, April 12, 1900 (page 238).

ON DIRECT EXAMINATION BY MR. SCARRITT.

In real estate business in Kansas City, Missouri, about ten years and frequently called upon as witness to testify to values of real estate in Kansas City. Familiar with the value of real estate on the three street pavements in question. All of the lots abutting on Main street are benefited at least $8 to $12 per front foot by pavement. The lots on Baltimore avenue and Wyandotte street (each and all of them alike) were benefited about $10 a foot (pages 239-241).

ON CROSS EXAMINATION BY COMPLAINANT.

Real estate market not active. Been dull for ten years. Better the last two years but not good yet (page 242). The property on 35th and Main streets regarded as one of the select neighborhoods of the town (page 247). Do not think Mr. Finley could have afforded to build the houses on Baltimore avenue but for the pavement thereon (page 249). Do not think that the installment houses, built by Mr. Finley, have hurt Baltimore avenue. I once owned a large amount of real estate in Kansas City—mortgaged it and lost it all (page 250). Would borrow money at 6 per cent, payable in five years, and build houses on complainant's lots. Say, house costing $3500 on each lot, counting the lots at $1750 each. This would make a gross investment of $5250 on each lot. Such a house would rent for $540 a year, which after paying interest on the loan would leave $190 to pay taxes, insurance, etc., if there were no loss of rents (page 251-2). An ordinary man could not get $3500 on one of these lots and handle the money himself. Complainant might (page 251). After the house is built the owner can borrow 60 per cent of the lot and improvement—this would be $3120—$380 short of the required sum, $3500, to build the house; this balance for each house might be secured on a second mortgage bearing 8 per cent interest by paying commission of 10 per cent for the loan (page 253).

Was a witness once before for the Barber Asphalt Paving Co.—for the Forest Ave. paving tax-bill case. That company, and everybody that I testify for usually pay me for my services. It is the practice of real estate men here generally to do that (254-5).

E. R. CRUTCHER:

DIRECT EXAMINATION BY MR. SCARRITT, APRIL 14, 1900 (page 257).

Residence, Kansas City, Mo. Business, real estate and fire insurance (page 257). I am familiar in a general way with the property of complainant involved in this suit. I think that the market value of every lot on Main St., Baltimore Ave. and Wyandotte St., between 33rd St. and Westport Ave. had the market value increased by at least $10 per front foot because of this paving (page 258). I think the ratio of benefits to each of the lots is the same in proportion to the number of feet frontage. This statement applies to the distribution of special benefits on all the streets (page 259).

CROSS EXAMINATION BY MR. SMALL FOR COMPLAINANT.

Don't remember when this pavement was laid. Could only state that values in this immediate vicinity have fluctuated considerably in the last three or four years on account of special local reasons and I could not state definitely what these lots could be sold for at any particular time. In the statement made that these lots were increased in value at least $10 per foot by the pavement, I meant that if the lots were worth $50 at any particular date they were increased to $60, but if these lots become depreciated to $30 a foot they would be worth $10 more with the pavement than without it (page 260). It is true that there is no activity in real estate now but we do not attribute it to the number of paved streets (page 263). There has been a great deal of building in the neighborhood of complainant's property in the south part of town in the last three years. As a general proposition I cannot say that the price of vacant property in that part of town where all these houses have been built has increased in the last three years. The present condition of the real estate market is a mystery to those conversant with it (page 266).

A. B. BEEDLE:

DIRECT EXAMINATION BY MR. SCARRITT, APRIL 16th, 1900 (page 271).

Reside, No. 3608 Baltimore Ave. on one of the street pavements in question. Remember the fact of the laying of

the asphalt pavement on these three streets in the fall o 1897 (page 271). Am familiar with the lots of complainan described in the bill of complaint in this case. In my opin ion they were benefited by the pavements as much as $5 pe foot. Price of the lots was advanced $10 per foot as soo as pavements were put in (page 272). I know of no reaso why any one lot should be benefited more, according to it frontage, than any other lot by reason of the improvemen on which it fronts. I have lived on that part of Baltimor Ave. about 10 years; I moved there in 1890. The demand is now for lots on improved streets (page 274).

CROSS EXAMINATION BY COMPLAINANT.

Remember when there was an active demand for real estate in Kansas City and out there. That was considered a very fine suburb. Most of these houses have been built out there since the pavement were built by Mr. Finley on Baltimore Ave. I do not know what they cost (page 275). They were built and usually sold on the installment plan (page 276). I cannot recall any sales of property made out there in 1898 (page 280). The Barber Co. called on me with their petition for that work. There were very few houses on Baltimore Ave. at that time. There was nothing north of 36th St. up to 33d on Baltimore Ave., three blocks, and there was only one or two houses between 37th and 39th St. (page 281). Could have sold property on Baltimore Ave. in 1896 at $30 a foot. Did not know Mastin sold property to Finlay for $27.50 a foot since the pavement. I would not give $30 a foot for the southwest corner of 36th St. and Baltimore Ave. (page 286).

CHARLES E. FINLEY:

DIRECT EXAMINATION BY MR. SCARRITT, APRIL 17th, 1900 (page 287).

I reside at 4031 Warwick Blvd. Been buying and selling real estate in Kansas City 14 years. Built 190 some odd houses, I believe, in the last six years. I built some houses on Baltimore Ave., Main St., and Wyandotte St. Am familiar with the lots owned by complainant in this case described in the bill of complaint. I should think these lots were especially benefited, on each street, by the pavement, on a conservative estimate $10 a foot (page 288).

Know of no reason why any one of the lots on either of these streets along the distance improved was not benefited to the same extent relative to its frontage that the other lots along the street were. See no difference at all (page 288). I sold property on these streets which I consider I could not possibly have done but for their being paved. I purchased a block of ground between 35th and 36th on Baltimore Ave. and sold that, however; and had a client who bought, at my suggestion, a block of ground on Wyandotte St. between 37th and 38th, on which I sold some lots and built some houses. I bought the ground there at about an average of $28 a foot and sold it at about, after putting down the stone sidewalks, $38 to $40 (page 289). The houses I built on these lots run from about $4,000 to $5,500. Average prices at which I sold these lots, exclusive of the buildings thereon, was sold, $40 to $45 (page 290).

CROSS EXAMINATION BY COMPLAINANT.

I bought those lots a little over two years ago, since the pavement was put down. I think it was about $26.50 a foot I paid Mr. Mastin for them (page 291). I built to order Mr. Howe's house, Mr. Will Irvin's, Mr. Adams' and Mr. Clendenning's. These were all I built to order between 37th and 38th street on Baltimore avenue. I should say I built one-fourth of them to order. The other three-fourths I built to carry till I could sell them. On these three streets I have built, I should think, about 28 or 30 houses. In figuring these lots as sold at $40 to $45 a foot I gave the lots the benefit of the whole profit on them and improvements in sales made (page 292). The installment plan of sales of this property was as follows: One-fourth cash, one-fourth in monthly installments, and one-half running a period of five years. These installments bear interest at 6 per cent. from date of note. For instance, if I sell a house for $6,000 they pay $1,500 down, there would be $1,500 payable in monthly installments, about $50 a month, and the other half runs for the period of five years, interest payable semi-annually on the whole. If there is a default the whole becomes due. Never had a foreclosure on any of these streets. I am pretty nearly out on monthly payments on most of them. The market here for real estate is very unsatisfactory for a property owner. It is pretty hard for a man to realize what his property is worth. It has been so for the

past ten years. That comes simply because the outside people do not seem to appreciate the value of property. I do not know of a piece of ground in Kansas City that has been well sold in years. It would be an isolated case if I knew of a piece well sold (page 294). I think property out there has maintained its prospects better through the dull market periods than any other property in Kansas City. It is a new country (page 295). It was sought after during the busy times for speculation purposes more than using it for homes—it was held very high—they had building restrictions of $4,000 on Baltimore and $12,000 on Main street (page 296). I bought some property on Baltimore avenue south of the church, near Westport avenue, cost me $23.32 a foot. Got the funds for making improvements from some other person (page 297). These improvements I have made have been partially by my own funds and partially by other people's. Dr. C. C. Olmstead and Dr. Barber were among those to whom I have sold property. Dr. Barber is an osteopath (page 297). Mr. Armour being on Warwick boulevard helps to sell property out there, and I think that all nice residences help to establish the value. Mr. Armour's house cost $50,000 or $60,000 or more. It is largely true that a man of large means generally builds his own house (page 298). It is only in a general way I said those houses cost $4,000 to $6,000, I do not want to tell what any of them cost—my houses cost me from $3,200 to $4,800 (page 303).

R. H. FIELD, in rebuttal, on his own behalf, May 9th, 1900, (page 343).

"On the question of benefit to property on account of the pavements in question and the market value of the same I wish to say this, that I do not consider that there has been any market value for real estate in that district since August, 1887." (page 343). "I do not see how the benefit to this property and its market value can be estimated or stated when there has been no market and no scale of prices per lot or per front foot during the time that I have named; until within two years ago, at the farthest two and a half years ago, from about 1889, I do not believe there were 10 residences built *in all Kansas City's residence district*, that cost

$10.000 each. I do not believe there were 25 residences constructed between 1889 and 1897 that cost $7,500.00 each, and I do not believe there were 50 residences, built from 1889 to 1897, costing $5,000.00 each. Not only from 1887 to 1897 was there a depressed state in the market of real estate or improvement of real estate, but within the past three years real estate has not increased in value to what the owners think it ought to be worth, while our special taxes have been continual and on the increase. We have had not only these pavements in the outlying districts but we have had all manner of special improvements, parks containing one hundred to two hundred acres have been condemned and the cost assessed as special taxes, and we have had additional laws passed in Kansas City allowing them to levy a maintenance tax throughout the district without reference to the fact whether the property assessed fronts on the improvement or not, some of the property two miles away from the improvement, so that whatever increase Kansas City has had in the past two years is due to the general condition in other matters being better. We hope we are now on the up-grade, but the market is not yet such a market as we would call a market value for real estate.

I desire to state that of the seventeen lots described in the bill in this case I have not had inquiries from any proposed purchaser for exceeding three of those lots within the past ten years. I sold two lots whereon the Baptist church mentioned in the testimony of defendant was constructed in 1889, nearly two years after the so-called boom, for fifty-five dollars a foot all cash, and there wasn't a pavement, no curbing or even sidewalks except maybe a wooden sidewalk in front of the property, and I have not during my knowledge of the history of property in that district known it to sell so cheaply as it has within the past two years. I bought lots one and two, seven and eight, block 39 Hyde Park, described in this bill in May I think, 1889, May or June—I think it was May, and I then paid I think it was nine thousand dollars for those lots. There is a frontage of 110 feet on Baltimore avenue and 110 feet on Main street. This purchase was made by me eight years before the pavements in question. There was a lot on Main street, lot number 4, block 39, fifty feet south of the lot I have just named, tnat during this year was purchased for forty dollars a foot and

can be bought for that sum today from the present owner. It belongs to a son of A. M. Allen of Westport and I had it offered to me day before yesterday" (page 344).

Section O.

Complainant's knowledge of the Paving Proceedings.

There is no proof: That complainant invited or encouraged defendant or the Westport authorities to lay the pavements or either of them; or that complainant knew either of the paving proceedings were contemplated before the defendant's procurement of the municipal order and contract therefor; or that the complainant, before the completion of the work, and issue of the special tax-bills, had any knowledge of the custom and course of action of the Westport authorities to adopt resolutions declaring asphalt street pavements necessary, enact city ordinances ordering the work and contract therefor, on petition of resident abutting land owners, procured and presented by defendant; or of the provision in each of the resolutions, ordinances and contracts that the asphalt used therein for these pavements should be Trinidad Lake Asphalt, or that the municipal proceedings for the pavements in question were procured by defendant in the manner alleged and shown.

By way of new matter in its answer filed in this case, the defendant made the following allegations as to complainant's knowledge of the municipal proceedings in question:

"This defendant admits that the complainant, R. H. Field, was not at the time the contracts were made for and the work of paving the streets done, as aforesaid, a resident of the city of Westport, but states that the said Field was at such times a resident of Kansas City, Missouri, and knew that the said contracts were being let and that the said work was being done and that he did not at any time object to, protest or remonstrate against the doing of said work until after the completion thereof by the defendant herein, and its acceptance by the said city of Westport, and that the said

Field, at all times, consented to the paving of said streets by this said defendant, and the improvement of his property thereby" (page 10).

This allegation was put in issue by complainant's replication (page 14).

No testimony was offered by the defendant to support any of these allegations in its answer. The complainant testifying in support of allegations in the "Twelfth" charge of his bill of overtures of compromise, said:

"When I learned that this Main street was going to be paved, or about to be paved, I went out on the car to this block 45, "Hyde Park," and noticed the macadam fronting on this lot 45. It had been swept preparatory to laying this asphalt pavement. * * * When I first learned they were going to pave Main street and the contract had been actually let I met Mr. McGowan and told him that I thought it was an outrage that I should be put to the expense of paving this block 45 again—and said to him I did not think it was exactly right for me to have to bear a fresh burden, and there was some talk that we could arrange the matter, and I had it in my mind to bring an injunction suit at that time, but the idea was given to me it would be arranged to my satisfaction, so it went on. I did not know exactly when the work was done on Baltimore avenue and Wyandotte street, it lies from three to four miles from where I live. It was done very quickly but I had information it would be done, or had been done, and I went out and saw it was done very shortly before Kansas City extended its limits and took in Westport" (pages 198 and 199).

There was not another word of testimony given or offered touching the subject of complainant's having any knowledge or notice of the proceedings of Westport and defendant as to these pavements, before the work was completed and the tax-bills were issued except such constructive notice as may be implied from the adoption and publication of the resolutions required by section 95 of the Westport charter and the journal of proceedings of the board of aldermen.

Section P.

Points and Authorities.

The following are the propositions of law and citations of authority based upon the foregoing statement of the case:

I.

The provisions of the Missouri legislative Act (Session Acts 1895, pages 85 and 86, sections 88 to 95), under which the tax-bills in question are claimed by the defendant as liens upon the complainant's real estate, deprive the complainant of his said real estate without due process of law, and deny the complainant, a resident of Kansas City, the equal protection of the laws afforded to resident owners of property in said city of Westport, and take his property for the private use of said residents of Westport, and violate section 1 of the 14th Amendment to the Constitution of the United States.

See the provisions of the Missouri legislative Act in question quoted (pages 23 to 26, *ante*).

The parts of the record in this case, upon which the above proposition is based, are the following:

"Fourth" charge of the bill quoted pages 3 and 4 *ante.*

Proofs stated and cited in sections "H" and "I" page 27 *ante.*

Adverse decision of the circuit court (decree, Pr. Rec. page 23; Opinion, Pr. Rec. page 517).

Complainant's assignment of errors, No. 7 and No. 8 (Pr. Rec. page 26).

Sections 88 to 95 of the state legislative Act, aforesaid, contain all of the provisions, conferring power upon a Missouri city of the fourth-class, to assess the cost of a street pavement against abutting lands. The complainant's contention is that these eight sections of the said state legisla-

tive Act are vitiated by the italicized provision in the quotation of section 95, which follows:

"Sec. 95. When the board of alderman shall deem it necessary to pave, macadamize, gutter, curb, (when such curbing is set out into the street beyond the sidewalk) or otherwise improve any street, avenue, alley, or other highway, or any part thereof, within the limits of the city, for which a special tax is to be levied as herein provided, the board of aldermen shall, by resolution declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; *and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvements, then the board of aldermen shall have power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided.*" (What follows in this section has no reference whatever to street pavements, or assessments therefor).

Not due Process of Law.

The absolute power over street improvements, conferred in this statute upon the majority of the residents who own adjacent lands cannot escape observation. No rule or reason is prescribed for the exercise of such power. This resident majority may act as freely without a reason as with a reason, and their action is to the same effect when done for a selfish or sordid reason as if done for the public weal. No right is reserved to the municipal authorities by even a unanimous vote to proceed in opposition to a remonstrance of such resident majority, no matter the public convenience or necessity, and no matter the paucity of land on the street owned by such remonstrators. And no provision is anywhere made for a review or reversal of unjust or arbitrary action on their part. This provision of the statute cannot be ignored or disregarded. When the remonstrance authorized by this statute is filed by such resident majority, such remonstrance arrests and destroys the power of the

board of aldermen to order and contract for a proposed street improvement at the cost of adjacent lands, and being prohibited by the statute, a municipal order for the work and assessment of the cost ~~of a street improvement~~ thereof to adjacent lands, in spite of such remonstrance, is held to be utterly void.

Knopfi v. Roofing & Paving Co., 92 Mo. App., 279;
Brady & Curby v. Rogers, 63 Mo. App., 222.

Had the statute in question made the consent of the majority of all who own land fronting on a proposed improvement, rather than only of those who reside in the city, the basis of municipal power to make such improvement, this would not then have been due process of law. The point here is simply this: The statute in question is contrary to the law of the land because of the power named which it vests in mere individuals over the affairs of the public and third parties.

"It is impossible to sustain a delegation of any sovereign power of government to private citizens, or to justify their assumption of it."

Shumway v. Bennett, 29 Mich. 464-5;
See also *Yick Wo v. Hopkins*, 118 U. S. 356;
Ex-parte Sing Lee, 96 Calif. 354;
State v. Garibaldi, 44 La. Ann. 810-813;
Walsh v. City of Denver, 11 Col. App., 523;
City of Sioux Falls v. Kirby, 6 S. D., 62;
City of Plymouth v. Schultheis, 135 Ind. 339;
Wells v. Weston, 22 Mo. 388-389;
St. Louis v. Russell, 116 Mo. 248;
State v. Field, 17 Mo. 54;
Cicero Lbr. Co. v. Town, 176 Ill. 26-27;
Thomas v. R. R. Co. 101 U. S. 71;
Robison v. Minor & Haug, 68 Mich. 555-556.

The above authorities are pointedly to the effect that this statute could not be sustained on any assumption that

the power conferred upon resident owners would be exercised by them in a reasonable, neighborly and a patriotic manner. The natural assumption is that such power would be exercised selfishly and oppressively.

Harward v. St. Clair Drain Co. 51 Ill. 135;
Cooley on Taxation, 2nd Ed. 364.

(*a*) Furthermore, the guarantee of "due process of law" in the 14th Amendment to the Constitution of the United States, protects private property against being taken or taxed for private use.

In re Tuthill, 163 N. Y., page 138;
Stratton Claimants v. Morris Claimants, 89 Tenn. 501-535;
Robinson v. Swope, 12 Bush (Ky.) 22;
Mo. Pac. Ry. Co. v. Nebr. 164 U. S. 403, and cases cited;
Fallbrook Irrigation District v. Bradley, Id. 158-166.

A statute like the one in question which authorizes taxing the cost of paving a public street to adjacent lands, only when a majority of the resident owners of such lands do not remonstrate against the improvement in its meaning and effect authorizes such taxation for the private use of such residents and for that reason violates the law of the land.

In re Tuthill, 163 N. Y. 133;
Davis v. Board of Commrs. 65 Minn. 310;
Wickey v. Stearns Ranchos Co. 126 Calif. 150;
In re Thereasa Drainage District, 90 Wis. 301;
Reeves v. Treasurer Wood Co. 8 Ohio 333-346;
Attorney General v. City of EuClaire, 37 Wis. 401;
Cypress Pond Drainage Co. v. Hooper, 2 Metc. (Ky.) 350;
Keene v. Driggs Drainage Co. 45 N. J. L. 91-95;
Dickey v. Tennison, 27 Mo. 373;
Colon v. Lisk, 153 N. Y. 196-197-198.

If the Missouri Legislature intended to restrict the exercise of the privilege conferred upon residents in this statute for the public weal or the protection of others likewise interested, words to that effect should have been employed.

See authorities above cited.

"It is impossible to say that property has been taken by 'due process of law' unless the statutes provide expressly for every constitutional safeguard."

Powers Appeal, 29 Mich. 509-510.

A Denial of Equal Protection.

It will be observed that the privilege conferred by this statute upon the resident owners is literally *per capita*, and not one to be exercised according to frontage of land on the proposed street improvement owned by any resident, and of the most arbitrary character. The testimony shows that the city authorities of Westport placed a literal interpretation upon this statute, and utterly ignored non-resident owners of lands adjacent to a proposed street improvement. That is to say, non-resident owners of land abutting upon a proposed street improvement liable to be taxed, were not counted nor considered by the city authorities of Westport, while Westport owners of land, whether living on their lands fronting on the proposed street improvement or in another part of the city, were counted by such city authorities, in determining the sufficiency of a protest, to thwart city proceedings for a street improvement under this section of the City Charter (Pr. record, pages 73, 168, 435). In other words, if there were only three residents of a town who owned land adjacent to a mile of street improvement proposed, two of such residents, owning but 25 feet of such adjacent lands, entrenched by this statutory protection conferred upon them (as enforced in Westport), would be in position to dictate to the city authorities the grade of the entire street, and the materials and the manner of the work and to force concessions from the contractor seeking the job, all to their own advantage and profit and to the disadvantage and

loss of the other owners of such adjacent lands liable to be taxed with the cost of the improvement. This is unquestionably true as this statute is construed and enforced in Missouri.

Knopfi v. Roofiing & Paving Co., 92 Mo. App., 280;
City of Kirksville v. Coleman, (Mo. App.) 77 S. W. Rep., 121.

"Extreme cases are allowable to test a legal principle." Said Chief Justice Shaw in *Commonwealth v. Essex County*, 13 Gray, 253.

It is however, not necessary to the invalidity thereof, to prove that such action has occurred under the legislative enactment in question, "the fact that it may possibly happen, is enough to condemn the law." *City of St. Louis v. Allen*, 53 Mo., 55. See also to the same effect:

Colon v. Lisk, 153 N. Y., 194;
Dexter v. City of Boston, 176 Mass., 247;
Brown v. City of Denver, 7 Colo., 305;
Louisville etc. Co. v. Eubank, 184 U. S. 35;
Collins v. New Hampshire, 171 U. S., 33-34;
Minnesota v. Barber, 136 U. S., 313.

(In the later points of this brief will be found references to facts, alleged and proven in this case, which show an ill use of this statutory privilege in these and like proceedings, by and between defendant Paving Company, the resident land owners on each particular street paved and the Westport city authorities).

The value of the protection afforded by this statute to resident owners is obvious:

(*a*) The nature of a public improvement might be such that the adjacent lands, or some of them, would be damaged, or at least not benefited equal to the cost. Neither

of these consequences would be any defense to an assessment of the cost of such street improvement.

McQuiddy v. Smith, 67 Mo. App., 205;
Moberly v. Hogan, 131 Mo., 19;
Keith v. Bingham, 100 Mo., 300;
French v. Barber Asphalt Paving Co., 158 Mo., on page 556;
Same case, 181 U. S., on page 335.

(*b*) The grade of a proposed improvement might be such as to greatly inconvenience or damage adjacent lands proposed to be used therefor, yet, in states where there is no statute or constitutional provision creating a liability therefor, there would be no right of action against a city for damage for any such authorized improvement.

Householder v. Kansas City, 83 Mo., 492;
Transportation Co. v. Chicago, 99 U. S., 635;
Eldridge v. Trevezant, 160 U. S., 452;
Scranton v. Wheeler, 179 U. S., 141.

While upholding a statute which applied alike to all owners of land adjacent to a public improvement, the clear implication of the decision in *Eldridge v. Trevezant* is, that if the statute had put the non-resident owners of such lands on any different footing, that such statute would have violated the Fourteenth Amendment.

The privilege in question is not a mere civic privilege based upon local citizenship alone; if it were, it would have been conferred upon any citizen of Westport, and not be limited in each instance to the residents of the town, who own land fronting on the particular street proposed to be improved. It is perfectly plain that the Missouri courts understand and enforce the privilege as a right of property and not a mere right of citizenship. In a recent decision of the Kansas City Court of Appeals concerning this privilege of protest granted to residents in the same statutory provision governing Missouri cities of the third class, the court said:

"In cities of uneven surface, bringing a street to the

established grade is of very great importance since it has a decided effect on the value and convenience of property."

City of Kirksville, Mo., v. Coleman, 77 S. W. Rep., 120-122.

The vice of the statute in question is, that it divides the owners of lands fronting on a street authorized to be improved into two classes; resident owners and non-resident owners, and extends a protection of financial value to one class which it withholds from the other. All the owners of land abutting on a street or highway, constitute a class which is a natural one: Each owner has the same general interest in the value and use of the high-way to their lands, and the non-residents need protection against municipal abuses and indiscretion in street improvements, at least as much as resident owners. What stable reason can be offered which will justify the discriminating grant of such protection to the resident owner only? The non-resident is certainty equally interested in avoiding a street improvement which is a damage or inconvenience to his property, or which will not be a benefit equal to its cost. To withhold from the non-resident owner, the protection conferred upon the resident owner, as in the provision in section 95 of the state legislative act in question, is obviously a denial of the equal protection guaranteed in section 1 of the 14th Amendment to the Constitution of the United States.

Anderton v. Milwaukee, 82 Wis., 279;
Utsey v. Hyatt, 30 South Car. 360;
Saunder v. Benning, 38 Id., 502;
State v. Garbroski, 111 Iowa, 498;
Shirk v. City of Lafayette, 52 Fed. Rep., 857;
State v. Julow, 129 Mo., 176;
Roby, Trustee v. Smith, et al, 131 Ind., 342;
Sayre Boro v. Phillips, 148 Pa. St., 482;
Ellis v. Ry. Co., 165 U. S., 150;
Blake v. McClung, 172 U. S. 239;
Blake v. McClung, 2nd Appeal, 179 Id. 59;
The Stratton Claimants v. The Morris Claimants, 89 Tenn., 500.

Adverse Views Stated and Answered.

Buchan v. Roadwell, 88 Mo. 31, is relied on by the paving company as adverse to complainant's objection to the provision in section 95 of the state legislative Act in question. The entire decision on this point, is as follows (88 Mo. on page 36):

"There is nothing in the constitutional objection made that non-resident property owners are discriminated against by section 1, Article 8, of the charter, which provides that 'the common council on the petition of residents of Kansas City, who own a majority of front feet on a street to be graded, may order the same to be graded at the expense of the property owners'. When it is done the same rule of assessment applies to all the property whether owned by residents or non-residents. 2 Dill. on Mun. Corp., Secs. 752, 802. The legislature in the exercise of its paramount control of the state could have authorized the council to have ordered the grading of streets at the expense of property owners without any petition."

Complainant submits the following in answer to this decision of the Supreme Court of Missouri:

1. When, as here, the claim is made that a state statute violates a provision of the constitution of the United States, the Federal Supreme Court will form and declare its own independent judgment of the meaning and validity of such state statute, uncontrolled by the decision of any state court.

Yick Wo v. Hopkins, 118 U. S., 356;
Bush v. Kentucky, 107 U. S., 110;
Brennan v. Titusville, 153 U. S., 289;
Roberts v. Northern Pacific Ry., 158 U. S., 1-21;
McCullough v. Virginia, 172 U. S., 102;
Scott v. Neal, 154 U. S., 45.

2. Was the same point presented by the complainant actually decided by the Missouri Supreme Court? It is undoubtedly a true statement that "the same rule of assessment applies to all the property whether owned by residents or non-residents," but the objection here offered is not that

any inequality of assessment is authorized, between resident and non-resident owners of land assessed for an adjacent street improvement, but that the resident owners of lands adjacent to a proposed street improvement are authorized to protest against and prevent such public improvement being made at the cost of adjacent lands, while such privilege of protest and protection against an undesired and undesirable public improvement is withheld from the non-resident owners of such lands.

3. The other statement of the Missouri Supreme Court that, "the legislature in the exercise of its paramount control of the state could have authorized the council to have ordered the grading of streets at the expense of property owners without any petition," is also true, and this statement was likewise an evasion rather than a decision of the real question presented. It is not claimed but that the state legislature could authorize a street to be graded and paved by the city authorities, at the cost of adjacent lands, without conferring upon the owners of such lands any right of petition or protest, but the point here presented is that the legislature could not confer upon the residents, the means whereby they could protect their lands adjacent to a proposed street improvement from damage or inconvenience, or the cost of such street improvement, and withhold the same means of protection from the non-resident owner of such lands as in the state legislative act in question. In other words, as before contended for, and established by the authorities there cited on the same proposition, while the Missouri Legislature could have authorized cities of the fourth-class to make street improvements at the cost of adjacent lands without conferring upon the owners of such lands any right of petition or remonstrance, the means of preventing such improvements could not be conferred upon some of such owners and withheld from others of them, as in the Act in question, for this is a denial of the equal protection of the law. This statute is as arbitrary and objectionable, as if it had based the power of the municipality to order a street

pavement and assess the cost thereof against abutting lands upon a failure of protest of a majority of the owners of such lands on the east or north side of a street proposed to be paved.

A state legislature could authorize an attorney's fee to be taxed, in *all* civil suits in favor of the successful party, but it does not follow that it could authorize an attorney's fee to be taxed in civil cases in favor of a certain class of litigants, when the same privilege and protection was not extended to successful litigants in other civil cases.

Ellis v. Ry. Co. 165 U. S. 150.

A state legislature might require *all* employers of labor to pay their employes money for their labor, but a statute which requires manufacturing and mining corporations or firms to pay their employees for their labor with money and which forbids their payment with trade checks, without imposing the same regulations on other corporations and employers of labor is unconstitutional, because such a statute is a special law and denies an equal protection of the law.

State v. Loomis, 115 Mo. loc. cit. 319-320.
See also *State v. Julow*, 129 Mo. 164.

A state legislature could entirely exclude persons and corporations from doing a particular kind of business, but it cannot permit particular persons or a class of persons to follow such business and deny to others an equal privilege.

State ex rel. v. State Board of Ins. Commrs. 37 Fla. 575;
Cotting v. Kansas City Stock Yards, 183 U. S. 79, 108.

A state may authorize a city to change the grade of its streets and impose or withhold a liability for the damage to adjacent property resulting from such change of grade as done in this state previous to the constitution of 1875 (*Householder v. Kansas City*, 84 Mo. 492), but a state

legislature cannot, after imposing upon a city a liability for the damage resulting from the change of grade of any street therein, pass another law exempting the city from such liability for a change of grade of streets in a certain part of the same city, for this would be to deny to the owners of the lands in the particular district of the city the equal protection of the law and violate the 14th Amendment.

Anderton v. Milwaukee, 82 Wis. 279;
Eldridge v. Trezevant, 160 U. S. 452.

It is clear enough, that the provisions of section 95 of the Missouri Legislative Act, is a violation of the equal protection guaranteed by the 14th Amendment to the Constitution of the United States.

All of the sections of the Legislative Act in question authorizing street improvements at the cost of adjacent lands, fall with the void provision noted in section 95.

It is most manifest that the sections of the state legislative act in question were intended to operate and be effective as a whole and not in detached portions. To strike out only the provision of section 95 in question, and leave intact the other provisions in this legislative act, upon the subject of the special assessment of the cost of a street improvement against adjacent lands, would vest the board of aldermen with power to order and contract for a street improvement and charge and enforce the costs thereof to adjacent lands, unhampered and unhindered by the action of resident owners of such lands provided for in provision of section 95 in question, a power which the Missouri courts hold the legislature intended to withhold from the board of aldermen.

City of Kirksville, Mo., v. Coleman, 77 S. W. Rep., 121;
Forbis v. Bradbury, 58 Mo. App., 506;
Knoppi v. Roofing & Paving Co. 92 Mo. App., 279;
Brady & Kirby v. Rodgers, 63 Mo. App., 222;
City to use v. Eddy, 123 Mo. 558-9.
See also *Hoyt v City of East Saginaw*, 19 Mich. 39.

Therefore, none of the provisions of such legislative act, upon the subject of special assessment of the cost of street improvements to adjacent lands, can stand, but all thereof fall with the unconstitutional provision in section 95, as null and void.

Hoyt v. City of East Saginaw, *supra*, on page 44;
Virginia Coupon Cases, 114 U. S. 272, 304-5;
Sprague v. Thompson, 118 Id. 91, 94, 95;
Pollock v. Farmers Loan & Trust Co., 158 Id. 636;
Connolly v. Sewer Pipe Co.. 184 Id. 565;
Utsey v. Hiott, 30 South Car. 360;
State ex rel. v. Wardell, 153 Mo. 323;
Dexter v. Boston, 176 Mass. 247.

(This proposition is intended as also a reply to the contrary suggestion in the opinion of the trial judge filed in this case).

And the tax-bills in question are therefore null and void.

With the unconstitutional and void legislative provisions aforesaid, the municipal proceeding thereunder, including the tax-bills in question, necessarily fall, as null and void.

O'Brien v. Wheelock, 184 U. S. 450;
Daniels v. Tierney, 102 U. S. 419;
State ex rel v. St. L. & N. R. R. Co., 74 Mo. 163;
Dexter v. Boston, 176 Mass. 247;
State ex rel v. Wardell, 153 Mo. 319;
Brown v. City of Denver, 7 Colo. 305;
Anderson v. Hill, 54 Mich. 478;
Deitz v. City, 91 Wis. 422;
Ulman v. Mayor, 72 Md. 567;
Stuart v. Palmer, 74 N. Y. 183;
State v. Thomas, 138 Mo. 99.

No silence or inaction of complainant could give any validity to such void proceedings, or estop complainant from attacking or resisting the tax-bills.

"To constitute an estoppel by silence there must not only be an opportunity but an obligation to speak."

Wiser v. Lawler, 189 U. S. 260.

See also:

Batly v. City of Hastings, 63 Neb. 30-31;
Henshaw v. Bissell, 18 Wall, 271;
Filer v. United States, 9 Wall, 49.

Where objections, such as here made, go to the very ground work of the subject-matter, there is no principle of law on which any life or efficiency or right of action can be given to such void proceedings, and no mere silence or inaction of an owner of lands so illegally charged by such proceedings can be made the basis of an estoppel to attack or resist the tax-bills in question.

O'Brien v. Wheelock, 184 U. S. 450and other authorities last cited:

See also *Whitehead v. Arkansas etc. R.*, 28 Ark., 465;
Perkinson v. McGraff, 9 Mo. App., 26;
Keane v. Klausman, 21 Mo. App., 485;
Galbraith v. Newton, 20 Mo. App., 380;
City of St. Joseph v. Dillon, 61 Mo. App., 317;
State ex rel. v. St. L. & N. Ry. Co., 74 Mo., 163;
Verden v. St. Louis, 131 Mo., 98-9;
Wood v. Kansas City, 162 Mo., 389;
Hawthorne v. East Portland, 13 Oregon 282;
Smith v. Minto, 30 Oregon, 351;
Town of Clay City v. Bryson, Ind. Sp. Ct. 66 N. E. Rep., 498;
Steickert v. East Saginaw, 22 Mich., 111;
Winnebago F. & M. Co. v. Fon du Lac Co., 113 Wis., 72;
Mulligan v. Smith, 59 Cal., 234;
Keese v. Denver, 10 Colo., 122;
Batty v. City of Hastings, 63 Neb., 30-31.

And no promise to pay for the improvements will be implied in law or in equity because of any supposed or real benefit therefrom to the parties illegally assessed, as no fraud on the part of the complainant is alleged or shown.

Hedges v. Dixon County, 150 U. S., 182;
Berlin Iron Bridge Co. v. San Antonio, 62 Fed. Rep., 882;
Wheeler v. City of Poplar Bluff, 149 Mo., 36;
Hawthorne v. East Portland, 13 Oregon, 282.

Besides for work upon a public contract that is *ultra vires* and contrary to the law, or the policy of the law, the law will never imply a contract to pay.

Thomas v. Railroad Co., 101 U. S., 86.

Complainant not guilty of laches in not protesting to city authorities of Westport; nor in not seeking court injuntion to prevent the street pavements in question.

Defendant offered no testimony showing, or tending to show, that the complainant had any actual notice or information of the proposal of the board of aldermen to lay any of the street pavements in question, within the time prescribed in the Westport charter, resident owners of adjacent lands were authorized to protest against street improvements; the uncontradicted testimony of complainant is that he did protest to McGowan, defendant's agent, against the Main street pavement when he heard of it, and that he had no knowledge of the other two pavements until they were done or about done. (Pr. Rec. pages 198-199).

However, if the testimony showed, or had shown, that complainant had full and actual notice of the municipal proceedings as to each of the street pavements in question from the beginning to the end, and with such knowledge had failed to protest to the city authorities or the defendant Paving Company, and had failed to attempt to prevent any of such improvements by court procedure, the complainant could not legally, logically and justly be held culpable in

law or equity for the very simple and additional reason that any resistance or effort on complainant's part would have been in vain.

(1) Complainant was a non-resident of the city of Westport (Pr. Rec. pages 194-5). The Westport city authorities by construction and by practice have uniformly and rigidly confined the charter conferred right of protest against any improvement of its streets, at the expense of adjacent lands, to the resident owners of such lands (Pr. Rec. pages 73-168). "Non-residents did not count." (Pr. Rec. pages 435 and 440).

(2) No Federal court would have granted complainant an injunction to prevent the Westport board of aldermen enacting ordinances ordering the pavements.

New Orleans Water Works v. New Orleans, 164 U.S., 481;

McHord v. Louisville & Nashville Rd. Co., 183 U.S., 483.

(3) In view of the ruling of the Supreme Court of the state in *Buchan v. Broadwell*, 88 Mo., 31, no state court would have granted an injunction on the ground that the Westport charter provision in question was unconstitutional.

(4) And as the proceedings for the pavements in question were not had contemporaneously but successively, complainant could not have gone into the Federal Circuit court and stopped them, as the cost of no one of such pavements, liable to be assessed against complainant's adjacent lands, (as proven by the tax-bills issued therefor,) exceeded the sum of two thousand dollars.

Wheless v. St. Louis, 180 U. S., 379.

The gross amount of the special tax-bills issued against complainant's land for the three pavements, respectively, in question, will be found alleged in the bill (Pr. Rec. pages 2 and 3) and answer (pages 8 and 9).

The foregoing observations on Laches and Estoppel, have been added as a reply to the suggestion contained in the trial judge's opinion filed in this case to the effect, that the complainant did not protest against these improvements and therefore ought not to be allowed to question the constitutionality of the charter of the city of Westport by reason of the provision in section 95.

No laches in filing bill in equity in this case.

The special tax-bills in question purport to have been issued in October and November, 1897, (pages 2-3-8 and 9). Complainant's bill in equity to cancel them, was filed January 4th, 1900, (page 1). From about the date of such issue to within a day or two of the filing of such suit negotiations for their compromise were pending between agents of the defendant Paving Company and complainant. (Page 78) In these circumstances there is no ground for any claim of laches on the part of complainant in filing this suit.

Turner v. Johnson, 95 Mo., 447-448.

Besides there is no ground for any claim of laches on the part of complainant in ~~the~~ bringing ~~of~~ this suit sooner, when there is neither a showing nor pretence of any loss or prejudice thereby to defendant Paving Company.

Pacific R.R. Co. v. Atlantic R.R. Co., 20 Fed. Rep., 277;
Hanchett v. Blair, 100 Fed. Rep., 817;
Menendez v. Holt, 128 U. S., 523;
Spalding v. St. Joseph's Industrial School, 107 Ky., 400.

II.

The special tax-bills in question are void, because the required preliminary resolution of necessity for the pavement, adopted by the board of aldermen in each case, declares that the pavement should be made of "genuine Trinidad Lake Asphalt," and thus tied the hands of the Board of Aldermen and Mayor at the outset so that the ordinance and contract coming on later, could not provide for or permit the doing of the work with asphalt from elsewhere.

See section 95 Westport charter page 26 *ante*.
See "Tenth" charge of bill page 6 *ante* (Pr. Rec. p. 5)

"Amendment to Tenth charge" of the bill page 6 *ante* (Pr. Rec. p. 22).

See resolutions in question, pages 28-29 *ante* (Pr. Rec. pages 121-147-171).

See complainant's assignment of errors, No. 24 and No. 25 (Pr. Rec. 30).

The contents of the respective resolutions, adopted by the board of aldermen for the pavements in question, were in substance the same, to-wit:

First. Each of the resolutions contained the required declaration that the pavement "was necessary to be done."

Second. Such declaration was followed by the following words in each resolution: "The pavement shall consist of *a genuine* Trinidad Lake Asphalt pavement; the base to consist of," etc., (here follows a description of the other materials and manner of the work, to-wit: the foundation of stone, the binder course of concrete and the wearing surface, the matrix of which was required to be composed of genuine Trinidad Lake Asphalt). *Ante page* 28.

The authority for a resolution of the board of aldermen of Westport for a street improvement, is in Sec. 95 of the State Legislative Act quoted *ante* page 26. A resolution for a street improvement is not elsewhere mentioned. For convenient view thereof this section is here reprinted:

"Section 95. When the board of aldermen shall deem it necessary to pave, macadamize gutter, curb (when curbing is set out in the street beyond the sidewalk) or otherwise improve any street, avenue, alley or other highway, or any part thereof, within the limits of the city, for which a special tax is to be levied as herein provided, *the board of aldermen shall, by resolution, declare such work or improvement necessary to be done*, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liability to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such

improvements, then the board of aldermen shall have power to cause such improvements to be made, aud to contract therefor, and to levy the tax as herein provided."

A prior section (85), *ante* page 23, required the ordinance which was to be subsequently passed, to describe the materials to be used in the work and if such materials are not prescribed by ordinance the tax-bills are void. (*State to use v. Eddy*, 123 Mo. 558-9).

It will be observed that the resolution was required to be published for two consecutive weeks, and if no protest is made within ten days after the last publication, then the city board of aldermen had authority to cause the improvement to be made, by passing an ordinance ordering the work and authorizing the contract (Section 95, quoted *supra*).

The only thing required to be published in the whole proceeding was this preliminary resolution declaring the necessity for the work. This resolution under the law was intended to perform a double function, (a) to notify the resident property owners that the work was to be done, and (b) also to notify builders of pavements of the kind contemplated by the resolution so that they might take all lawful means to inform the city authorities of the advantages to the city and the property owners, in point of price, quality, etc., which they could offer, *before* the passage of the final ordinance, describing the material and authorizing the contract for the work.

Although the law did not by express provision require the work to be let to the lowest bidder, it certainly did not contemplate that this preliminary resolution should, under cover of describing the materials of which the work should be constructed, so tie the hands of the board of aldermen and mayor that, when they come to enact the final ordinance and contract for the work, they would be compelled to so describe materials that the work could be done only by a certain person and with his materials to the exclusion of all other persons in the business, although they might do as good work and furnish the same material for a less price. Yet

such was the effect of the language in this preliminary resolution limiting the asphalt to be used in the pavement to Trinidad Lake Asphalt.

Partridge v. Luear, 99 Calif. 519;
Piedmount Paving Co. v. Allman, 136 Calif. 88;
King-Hill Brick Mfg. Co. v. Hamilton, 51 Mo. App., 120;
City of Atlanta v. Stein, 111 Ga. 792.

And thus all opportunity for the city or the property owners to have the benefit of competition at any time or stage of the proceedings was destroyed; whereas, by the requirement that the preliminary resolution should be published, the law contemplated that they should at least have the benefit and advantage of the competition which that publication would naturally create, among the builders of asphalt pavements, before passing the final ordinance describing the materials and authorizing the letting of the contract for the work.

City of Atlanta v. Stein, 111 GA., 789, IS POINTEDLY APT ON THIS PROPOSITION—*Syllabus:*

"A municipal corporation, although not required by its charter to let contracts for public works to the lowest bidder, and although clothed as to such power with the broadest discretionary power, had no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a designated class."

Extract from Opinion of the Court.

"The vice of the ordinance now under consideration is that it cuts off the power to fully and freely exercise that very discretion which the public good requires the mayor and general council to exercise in making contracts. It effectually ties their hands and prevents their availing themselves of opportunities to make advantageous agreements in behalf of the city, which, it is idle to say, would not be prevented were this ordinance out of the way. We cannot, therefore, escape the conclusion that in adopting the ordi-

nance the mayor and general council exceeded their authority." (111 Ga., on page 792).

See also *Freeport Water Co. v. Freeport City*, 180 U. S. 588-600.

In the Georgia case it was a preliminary ordinance rather than a preliminary resolution thus vicious. It certainly needs no elaboration to apply the same arguments to the preliminary resolution for the pavements in question. These resolutions specifying "Trinidad Lake Asphalt" as the asphalt to be used in proposed street pavements, so tied the hands of the board of aldermen that they could not, in ordering or letting the work thereafter, provide differently in the ordinance or contract and thus have any competition for the work, without violating these provisions of the resolutions. As the natural consequence of the resolution, from its specifying and requiring the named materials was to prevent the board of aldermen from having or exercising any independence, judgment or freedom as to the materials for the pavement, when it came to the passage of the ordinance ordering the work and letting the contract therefor, such a consequence must be presumed as intended by the board of aldermen in the resolution, under the familiar presumption that everyone is presumed to intend the natural consequence of his own act. Minnesota v Barber 136 U.S.

Lawson on Presumptive Evidence, page 262.

Moreover, the facts and circumstances, *aliunde* the preliminary resolution in question, stated and cited in Sections "K" and "L" *ante*, pages 34 to 48, show conclusively that the only purpose of the "Trinidad Lake Asphalt" specification in these resolutions was to clinch the same specification in the ordinance ordering the work and ultimately the job for the defendant.

Furthermore, nnder the provisions of the law, the preliminary resolution, was only authorized to declare "such work or improvement necessary to be done." It is true that the resolution might declare it necessary to pave a street with asphalt or vitrified brick or any kind of stone,

as a part of the description of the work (see section 94 *ante* page 26, *City of Kirksville, Mo., v. Coleman*, 77 S. W. Rep., 120.) Because such declaration would not necessarily be false. But the law did not authorize a declaration which could not be true. For instance, the board of aldermen could not declare it necessary to pave a street with gold or silver or precious stones, for the plain reason that there could be no such necessity.

The same reason denies the right of the board of aldermen to declare in this resolution, that it was *necessary* to pave these streets with *Trinidad Lake* Asphalt. There could be no *necessity* for restricting the asphalt to *Trinidad Lake* Asphalt.

It may have been necessary to have an asphalt pavement, or a brick pavement, or a stone pavement, but to declare that it was *necessary* to have the asphalt come from Trinidad Lake, or Bermuda, or California, or the brick from Galesburg, Ills., or Pittsburg, Kansas, or Kansas City, Mo., or the stone from Medina, N. Y., or Cottenwood Falls, Kansas, or Carthage, Mo., or any other particular place would be necessarily false, when the evidence showed that there would be no substantial difference in the pavement no matter if the asphalt, or brick, or stone came from another place. In the case at bar the declaration of a necessity for a Trinidad Lake Asphalt pavement contained in this resolution is false and impossible on its face, because the proof shows and the court will take judicial notice of the process of preparing asphaltum for paving purposes, and can therefore see that the place where the asphalt comes from originally is wholly immaterial and has nothing whatever to do with the quality of the manufactured or prepared article which alone is used in making pavements. The resolution therefore, insofar as it declared it necessary to pave the streets with *Trinidad Lake* Asphalt, was false, arbitrary and capricious on its face and in fact, and was therefore illegal and void. Indeed, under the facts and circumstances shown by the evidence, (stated and cited

in "Section K" and "Section L") the resolution for each of the pavements amounted to a declaration that it was necessary that the pavement be laid by a certain contractor, to-wit: the defendant, which had a monopoly of Trinidad Lake Asphalt—a still wider departure from the law and the truth—a still more arbitrary and unwarranted declaration. In fact the resolution of necessity does not declare that it is necessary to pave the street with asphalt, but says in effect, that it is not necessary to pave it at all or with any kind of asphalt unless Trinidad Lake Asphalt is used. A valid resolution was a necessary jurisdictional step, to the validity of the subsequent ordinance and tax-bills and without which the whole proceedings were void.

City to use v. Eddy, 123 Mo. 546;
Hoyt v. East Saginaw, 19 Mich. 59;
McLauren v. Grand Forks, 6 Dakota, 397.

III.

The "Trinidad Lake Asphalt" specification in the resolutions and ordinances for the pavements make a monopoly of an article of interstate and foreign commerce, and cannot be saved from illegality and nullity under cloak of a municipal liberty of judgment and action upon the subject.

This point is intended to elucidate the several points of this brief on the "Trinidad Lake Asphalt" specification, and to sweep away the dust which will be thrown thereon, rather than as a single point.

1. No sort of legal excuse is given or exists for the "Trinidad Asphalt" specification. It is not pretended by any testimony that "Trinidad Lake Asphalt" contains any useful property for paving purposes not in the asphalt of numerous other places. The specifications for the pavements in question call for "Refined Trinidad Lake Asphaltum," *ante* page 31 (Pr. Rec. 128, 154, 177).

This requirement of "refined Trinidad Lake Asphaltum" undisputably implies that there are foreign substances to be taken out of the crude asphalt from the Trinidad Lake to obtain and utilize the paving properties therein. The undisputed testimony in the case also shows that this and all other asphalt has to be refined before it is fit for use in street paving; also that when refined the paving properties thereof are the same, no matter whence it comes; also that asphalt abounds extensively in the United States and universally in tropical countries, and that the asphalt of places other than the Trinidad Lake Asphalt was well known and in general use for street paving in many of the cities of the United States, at and before the orders and contracts for the pavements in question (Pr. Rec. pages 463 to 466, also pages 423-4).

The same facts also appear in the dictionaries and encyclopedias, but more at length and more in detail in numerous text books and official reports, etc., in the library of Congress at Washington, some of which are the following:

Asphaltum, by Edward Parker, in United States Geological Survey, 18th Annual Report, Pt. 5, pp. 919, 948. Washington, 1897, 4°.

Asphaltum, by Edward W. Parker, U. S. Geo. Survey; 19th Annual Rep., Pt. VI., pp. 187-204.

Asphaltum and Bituminous Rock, by Edward Parker, U. S. Geo. Survey, 20th Annual Report, Pt. VI, (cont) pp. 251-268. Washington, 1899, 4°.

Same Report in Vol, 6 of Annual Reports of Interior Dept., 1899, p. 251.

U. S. Geo. Survey, House Documents, Vol. 50, p. 653; Vol. 17, Mineral Resources, 1900, p. 653.

U. S. Geo. Survey, 21st Annual Report, Pt. VI. pp. 319-332. Washington, 1901, 4°.

Byrne on Highway Construction (3rd Ed.), pages 38 to 61.

Id, page 161. Id. page 50, sec. 99a

Asphalts and Bitumens, by Samuel D. Sudtler, Ph. D., Journal of the Franklin Institute, Vol. 140, page 198.

15 Journal of the Society of Chemical Industry, 871-875

17 Id. 1006

1-3 American Asphalt Journal, Aug. 1901 - July 1903.

This court will take judicial notice of the facts stated in these references; also of the asphalt in the many other places besides the Island of Trinidad, just as it would take notice of the existence and abundance of limerock, minerals, wheat and other well known products of the world, and the use of the same.

Higgins v. ~~Lyon~~ Lime, 130 Mass. 3;
Phillips v. Detroit, 111 U. S. 606;
Brown v. Spellman, 155 U. S. 670;
Grimes v. Eddy, 126 Mo. 180, and cases cited.

A short study of the literature cited on the subject more than verifies the testimony taken that the crude asphalt from every place in the world must be refined and the paving properties separated and extracted from the other matter therein before it can be used in street paving. None of these asphalts will illustrate the idea better than the "Trinidad Lake Asphalt." Thus we find the crude pitch asphalt of the Trinidad Lake analyzed as follows: Water, 28.50; ash, 25.40; *bitumen*, 39.10; original matter not in Sol., 6.90.

See "The Asphalt and Bituminous Rock Deposits of the United States," by Geo. H. Eldredge in U. S. Geological Survey, 22d Annual Report, Part 1, p. 224.

The paving properties, and all of them, are in the bitumen. The bitumen consists of asphaltene and petrolene (asphalt and petroleum).

See top of page 224 of last citation. See also Byrne on Highway Construction, (3rd Ed.), 38.

The difference in the refined asphalts from the various places is only in the ratio of asphaltene and petrolene in the bitumen. In few places only of the world is asphaltene and petrolene of the bitumen in proper proportions for street paving purposes. A table prepared by A. S. Cooper, civil engineer, in his article on "Asphaltic Cement," Sept. 15th, 1899, Vol. 38, Scientific American Supplement, p. 15597, states the proportion of petrolene and asphaltene in the bi-

tumen taken from the asphalt in various places of the world, as follows:

NAME OF ASPHALT.	BITUMEN.	
	Petrolene, soluble in ether	Asphaltene, unsoluble in ether
Bechelbrown	85	15
Jew pitch, Dead Sea	75	25
Cexitambo	5	95
Syrian	48	52
Lake, best, Trinidad	70	30
Lake, average, Trinidad	63	47
Soil, Trinidad	47	53
Chocolate pitch, Trinidad	49	51
Iron pitch, Trinidad	64	46
Asfalto, California	52	48
Glance pitch, California	7	93
Bitumenized sand, California	93	7
Bitumenized Argil, California	80	20

Then comes the following statement:

"As far as experiments have progressed, 80 to 85 per cent of petrolene and 15 to 20 per cent of asphaltene would be the proper proportion for cement for street pavements employed *in combination with sand and limestone.*" *

The conspicuous fact proven by this table of scientific learning is that the bitumen extracted from the crude asphalt of nearly all places is not in proper proportion for paving mixture. In most of it the petrolene is deficient in quantity; in some, it is the asphaltene that must be supplemented. The bitumen from "Trinidad Lake Asphalt" needs to be supplemented with over 100 per cent of petrolene to make it in proper proportion and fit for use in combination with sand and limestone for street pavements. It is manifest, however, that the bitumen from various places in the world may with facility be brought into proportion and made fit for street pavement; for example, petrolene from the oil of Texas, California or any place in the world

*Mr. Cooper had written a previous article upon "The Genesis of Petroleum and Asphalt in California," Vol. 36, Scientific American Supplement, p. 14738.

may be and is used to supplement the bitumen of the "Trinidad Lake Asphalt," or other asphalt, to make a proper mixture for a street pavement, or where the petrolene of the bitumen extracted from any crude asphalt is in excess of proportion to the asphaltene, the asphaltene is brought into proper proportion and the bitumen made fit for use in combination with sand and limestone for street pavements by adding the like paving substance from any other place. (See also article 74, Engineering and Mining Journal, page 782 3rd column). From these facts it is made clear that any and all claim that "Trinidad Lake Asphalt" *per se* possesses any distinct paving property that is not possessed and cannot be supplied in any other asphalt is altogether groundless and arbitrary.

It is thus made clear that a liberty of judgment and discretion of the board of aldermen to select asphalt, according to place, is not necessary to secure a good or the best asphalt pavement, nor necessary to the exercise of a sound discretion or proper action upon the subject. To uphold the state or municipal legislative enactment making a discrimination as between places of asphalt merely because the bitumen of one contains a greater amount of one paving property or a less amount of another paving property than the bitumen from the crude asphalt of another place, would sustain a legislative distinction as to flour from wheat, which produced more flour than bran and *vice versa*.

The pavements are not, as the resolutions and ordinances on superficial reading imply, asphalt pavements. There is really no such thing as an asphalt pavement. The asphalt used in a street pavement is a small percentage of the materials therein. Its part and use in the construction of a pavement is only as a cement to bind and hold together and form into a sort of concrete the broken stone and sand which are the main ingredients of the pavement. (See specifications for the pavements, page 31 *ante*).

It will possibly give the court a more perfect assurance of this statement to read the report of Mr. A. W. Dow,

inspector of asphalts and cements, District of Columbia, on "Some Points on the Theory and Practice of Asphalt Mixtures."

U. S. 55th Congress, 3rd session—Senate Document No. 38, on Municipal Matters of the District of Columbia, page 50-80. Especial attention is called to the following words of Mr. Dow in this report:

"I do not propose here to explain the cause of any particular failure or to tell you directly how to avoid failures, but merely to present in as practical a way as possible the influence the selection of different ingredients has on the character of pavements on which they are used, and to discuss the theory of the *cementing property of asphalts.* In this way the cause of some of the failures will be made self-evident and why poor pavements are often made with good asphalts. * * * Id. page 50. The problem now to deal with is the selection of the sand. What sand which can be practically handled can be used with the softest possible asphalt cement and yet make a desirable pavement, that is one that will not shove or mark too much under the traffic of the particular street upon which it is to be laid, on the hottest day. Such a mixture as will be able to resist the cold. * * * Id page 51. The great difference in pavements, due to the use of different sands, is not appreciated by many. It is not merely a theoretical difference, to be put aside as too trivial to be considered in practical work, for there is nothing responsible for more failures than the use of the wrong sand. * * * Id page 52. As sand is 90 per cent of the pavement why should it not be the most important ingredient to consider; and when a pavement is a failure why should it not be more responsible than the asphalt, which now bears the brunt of all failures" Id. page 53.

If the board of aldermen of Westport could pass by and exclude the like asphalt of California, Utah, Mexico, Cuba and Venezuela and specify "Trinidad Lake Asphalt" it necessarily follows that they could pass by and exclude all of the sand on the banks and islands of the rivers of Missouri, Kansas and Colorado and require the sand from any coast or island of the seas, for a street pavement in the city of Westport.

2. The whole argument made in favor of the right of the city to specify "Trinidad Lake Asphalt" for the pavements is, that the city, in paving its streets, had the same liberty to prescribe the materials and the place of origin of such materials, for such pavement, as an individual has in the erection of improvements at his own expense. This premise as to the pavements in question is false from almost every point of view. There is no plane of equality on which a public corporation in its legislative capacity, can be put or stand with an individual acting in his own right.

Taylor v. Carondalet, 22 Mo., 110-111;

Municipal corporations are agents of limited authority and are in no sense principals. In ordering street improvements and assessing abutting lands therefor, they are agents or trustees of the public and of the owners of such abutting lands and nothing else.

The Mayor etc. v. Reynolds, 20 Md., 1;
McQuiddy v. Brannock, 70 Mo. App., 535.

The only individuals a board of aldermen could be judged on a plane with, would be individuals who were mere agents and whose acts could be opened to the core, whenever brought in question in any court of law or equity. No more than a private agent can a public officer be deemed to have capricious, arbitrary or oppressive authority.

"A discretion delegated to an officer is a sound, legal discretion the meaning of which is well known and understood in the law, and is not an unlimited license to the officer to act and do as he pleases irrespective of restraint."

State ex rel. v. LaFayette Co., 41 Mo., 226;
See also *People ex rel. Coughlin v. Gleason*, 121 N.Y. 631-635:
Inge v. Board of Public Works, 33 Southern Rep., 681.

In the case of *Adams v. Brennan et al*, 177 Ill., 194, the Supreme Court of Illinois held void a contract of a school

board for the construction of a public school because it provided that the work should be done by union labor only. The ground of the court's decision was that, to hold otherwise would be to recognize a power in the school board that the legislature of the State of Illinois could not have in terms conferred upon such board. It was claimed *in that case*, that as an individual would be authorized to put that clause in a contract with the builder of improvements on his property; that the public must be construed to have the same authority, in reply to which the court said:

"Nor can the fact, if it be a fact, that an individual might make such a bargain, authorize these public officers exercising a public trust to do so. The individual may, if he chooses, give away his money; but the public officer, acting as a trustee, has no such liberty, and no right to surrender to a committee, or anyone else, the rights of those for whom he acts." (177 Ills., on page 201).

The aldermen of a city are agents in a dual sense: They are leglislative agents in prescribing rules of action, for the exercise of ministerial functions of the city, and for the government of third parties and the public generally. They are administrative agents of the city in the business matters of the city; that is, matters of private and individual concern to the city.

Walla Walla City v. Walla Walla Waterworks, 172 U. S., 8;
Pikes Peak Co. v. City of Colorado Springs, 105 Fed., 2-11;
Little Falls Electric Co. v. City, 102 Fed. Rep., 663;
State ex rel. v. Rodgers, 107 Ala., 456.

Viewed as legislative acts the resolutions and ordinances of a municipal body are ordinarily immune from defeat or attack for the extraneous matters which lead to their enactment.

Soon Hing v. Crowley, 113 U. S., 704;
New Orleans Waterworks v. New Orleans, 164 U. S., 471;
Albright v. Fisher, 164 Mo., 64.

However, the federal courts will, if necessary to know the meaning thereof, look back of a state statute or city ordinance and see what is behind or beside the mere words thereof, when the attack made thereon is that such statute or city ordinance violates the federal constitution. Sometimes by looking at proofs offered on the subject; at other times by taking judicial notice of whatever may be generally known on the subject.

Smith v. Lowe, 121 Fed. Rep., 753;
Ahkow v. Nunan, 5 Sawyer, U. S. Ct., 553;
Ex parte Keifer, 40 Fed. Rep., 401;
Yick Wo v. Hopkins, 118 U. S., 356 and on page 373;
Smith v. Ames, 169 U. S., 467, 524, 525 and 526 and cases cited;
Ex parte Hansen, 28 Fed. Rep., 129;
R. R. & Telephone cases v. Board of Eq., 85 Fed. Rep., 303, 318;
See also *Fishburn v. City of Chicago*, 171 Ill., 338;
State v. Santee, 111 Iowa, 1;
Cooley's Const. Lim. (6th Ed.) page 125, note No. 3;
Higgins v. Lime, 130 Mass., 3.

Viewed as administrative acts, the resolutions and ordinances are necessarily like the acts of any agent, open to attack and defeat for any perfidy or other illegal action, or even for lack of authority of the agent, and the enquiry in such case is not confined to what appears upon the face thereof.

Weston v. City of Syracuse, 158 N. Y., 275;
State ex rel. v. Cincinnati Gas Light & Coke Co., 18 Ohio State, 264-301-302;
Oakland v. Carpentier, 13 Calif., 540;
State ex rel. v. Rogers, supra;
Little Falls Electric Co., v. City, supra;
Pikes Peak Power Co. v. City of Colorado Springs, supra;
Ogden v. City of Armstrong, 168 U. S., 224-239;

Walla Walla City v. Walla Walla Waterworks Co., *supra*;
Fishburn v. Chicago, 171 Ill., 343;
San Antonio Gas Co. v. State, 54 S. W. Rep., 289;
Dillon Municipal Corporation, 4th Ed., Sec. 908-914;
Beach on Public Corporations, Sec. 773.

In the succeeding points of this brief complainant attacks the ordinances ordering the pavements as legislative acts because of the "Trinidad Lake Asphalt" specification therein.

If these ordinances are legislative acts they will stand and be judged upon the same footing and be held to the same degree of responsibility and conformity to the constitution as a state legislative enactment. If they are administrative acts they are subject to attack not only for what appears upon the face thereof but for the abuse of discretion and other unauthorized action of the board of aldermen in enacting such ordinances not appearing upon the face of the proceedings; as administrative acts no part of the history of their enactment is covered up by any fiction or by any conclusive presumption in favor of their validity. In the law of principal and agent there is no *Blue-beard* chamber.

By no true reasoning can these ordinances be upheld or shielded as legislative acts by any argument that would not uphold a statute of the state in like words. And by no true reasoning can these ordinances, as administrative acts, be upheld or shielded from the real history of their enactment, by any fictitious presumption applicable to a legislative act.

If these ordinances stand forth purged of the extraneous, pernicious influences by which their enactment was procured by defendant's agents, it is because and only because they are legislative acts in the same sense as state legislative enactments and subject to the same test of conformity to the constitution. If, on the other hand, they are administrative acts then these paving ordinances are begrimed with the lobbying, undue influence and conspiracy of the defendant's agents

with the board of aldermen of Westport whereby their enactmentwas procured and whereby they are vitiated.

Conn. Mut. Life Ins. Co. v. Hilman, 188 U. S., 219.

To paraphrase a figure of the Missouri Supreme Court to the same effect (164 Mo., 65), this high court will certainly not permit the defendant to make these paving ordinances fish to escape the commerce clause of the Constitution of the United States, and then to make them fowl to escape the anti-trust act of Congress and the law of principal and agent.

It is, in any event, one of the established rules of this court, that it will not permit a right secured by a federal law to be defeated by a municipal ordinance on any mere doubt as to whether such ordinance shall be classified as a legislative or administrative act.

Walla Walla City v. Walla Walla Waterworks, 172 U. S., 8;
Yick Wo v. Hopkins, 118 U. S., 356.

3. It is not comprehensible how, in the matter of street paving chargeable to abutting lands, the city of Westport could be put on the same plane as an individual improving his own property. The city has nothing to do with purchasing or furnishing materials for such street improvement, and is in no wise obligated or chargeable therewith.

In such case the city charter contemplated that the work should be let out by contract to a third party; that the contractor to whom the work is let should buy, pay for and furnish all materials for the street improvement, that he be paid for the improvement, not out of public funds, but in special tax-bills against the abutting lands (Sec. 85 to 95 Incl., page 23, *ante*).

It was the prerogative of the board of aldermen to order the street improvements and to prescribe the materials therefor, in the resolutions and ordinances (Sec. 85 and Sec. 95).

City of Kirksville, Mo. v, Coleman, 77 S.W. Rep., 120;
City to use v. Eddy, 123 Mo., 563 (Par. III);

And the Missouri courts hold that the board of aldermen acts in its legislative capacity in prescribing the kind of materials for a proposed street pavement.

Rich Hill v. Donnan, 82 Mo. App., 386;
King Hill Mfg. Co. v. Hamilton, 51 Id., 120;
St. Joseph v. Wilshire, 47 Mo. App., 125.

These resolutions and ordinances go further. They require the contractor to get the asphalt for the pavements from a particular place. They do not leave the contractor any liberty to buy or supply and use the like material coming from elsewhere.

Partridge v. Lucas, 99 Calif., 519;
Piedmont Paving Co. v. Allman, 136 Calif., 88;
King Hill Brick Mfg. Co. v. Hamilton, 51 Mo. App., 120;
Taylor v. Carondalet, 22 Mo., 110-111.

They, therefore, deprive the contractor of a right given to him by the commerce clause of the Constitution of the United States.

Minnesota v. Barber, 136 U. S., 313;
In point, *State ex rel Treat v. Coler*, 166 N. Y., 144.

No rational view of the city charter of Westport furnishes any justification for holding that the board of aldermen of Westport are, or should be, invested with any discretion to interfere with the contractor as to the place from whence materials for street pavement should come. The liberty to buy where and from whom he pleased, the materials prescribed for a street pavement would seem to be one of the just and legal rights of the contractor. The public welfare is also promoted by his having and exercising such liberty, unfettered by any municipal rule or regulation. The only matter of proper concern to the municipality is that the contractor use the kind of material prescribed. It is no proper concern of the municipality whence the material may come.

The liberty of contract is one of the liberties protected in the guarantee of "due process of law." The ordinances for the pavements deprive the contractor of the liberty to buy and procure the like asphalt substance from any place in the world except from Trinidad Lake, and therefore violate the constitutional guarantee aforesaid and are void.

State v. Loomis, 115 Mo., 316;
Glover v. The People, 201 Ills., 549;
Adams v. Brennan, 177 Ills., 194.
Street v. Varney Electrical Supp. Co., (Ind. Sup. Ct.) 66 N. E. Rep., 895;
People ex rel Treat v. Coler, 166 N. Y., 144;
People v. Orange County Road Const. Co., 175 N. Y., 84;
People v. Gilson, 109 N. Y. 389;
People v. Hawkins, 157 N. Y. 1.

4. If the city of Westport constructed street pavements on its own account in its individual and proprietary capacity where it had to procure the materials for the improvement, or was in any wise obligated or chargeable therewith, (which is not this case) then it might be said with some semblance of reason that the city could buy the material from where and from whom it pleased. (*People v. Orange Co. Road Const. Co.*, 175 N. Y., 84). This very liberty of discretion though would carry with it the right and duty of the city to keep such liberty of action to the last moment practicable. This discretion furnishes no argument to sustain a city ordinance which unnecessarily prescribed the place whence such material should come or a particular person from whom the material should be purchased, for such an ordinance would cut off any and all such discretion of the administrative officers of the city to make such purchase elsewhere or otherwise. The difference in the first and second instance is obvious. In the first instance the liberty of municipal action is preserved. In the second it is abdicated and surrendered. The case of the city of *Atlanta v. Stein*,

111 Ga., 789, is instructive and conclusive reasoning on this proposition. That case involved the validity of an ordinance of the city of Atlanta which required all of the printing of the city to be done by a union printing office. It was claimed that the ordinance was valid, first, because there was no limitation in the charter of the city of Atlanta requiring work to be let to the lowest and best bidder. Second, because of the discretion of the city to contract as it pleased on the subject. The Supreme Court of Georgia, condemning this ordinance and holding it void, said:

"The vice of the ordinance now under consideration is that it cuts off the power to fully and freely exercise that very discretion which the public good requires the mayor and general council to exercise in making contracts. It effectually ties their hands and prevents their availing themselves of the opportunity to make advantageous agreements in behalf of the city, which it is idle to say would not be prevented were this ordinance out of the way."

The same thing is essentially true when in advance of contracting for an asphalt street pavement the board of aldermen determined and prescribed in the resolutions and ordinances that the asphalt to be used therein shall be limited to genuine Trinidad Lake Asphalt. It was equivalent to the mayor and board of aldermen saying to the city engineer and paving contractors: The contract is for such and for only such as have or can and will get "genuine Trinidad Lake Asphalt" and that the city will have no commerce with the asphalt of any other place or with contractors who may have, or may get the same kind of asphalt from any other place for the proposed street pavement.

The State of Missouri is a large purchaser of flour, wheat, etc , to supply the inmates of its penitentiary, almshouses, etc. Large appropriations are made at each session of the legislature of the public funds for such purposes. It is doubtless true that the warden of the penitentiary or other officer charged with the duty of supplying food to the inmates of the prison would have the discretion of buying in

good faith from where and from whom he pleased, such food. He might buy all the flour at the Jefferson City mill; the meat at the packing house of the St. Louis Packing Co.; coffee from Mexico; sugar from Cuba. This exercise of administrative discretion, however, would not sustain a legislative enactment which required these purchases to be made at the same places. The obvious difference between the exercise of the two state powers is this: While the warden may have uniformly purchased from the same place named in the state legislative Act he was not bound at any time to continue the purchases at these places, but was at liberty to purchase the flour elsewhere, the meat elsewhere, the coffee elsewhere, the sugar elsewhere, whenever in his discretion he saw fit to do so, and therefore the state was not regulating or interfering with interstate or foreign commerce in such administrative action, but upon the legislature enacting that these state purchases must be made from the particular person, or from the particular places; this would leave no discretion or liberty upon the subject in the state administrative officers making such purchases. Such legislative Act would, by its necessary operation, exclude any commerce, between all states and countries other than those named in the act for such state supplies, and would therefore violate the laws of interstate and foreign commerce of the United States. To hold otherwise, is to hold that the commerce clause of the Constitution of the United States does not apply to state and municipal commerce with other states and countries, which obviously is not true.

People ex rel Treat v. Coler, 166 N. Y., 144;
People v. Hawkins, 157 N. Y., 1;
Arnold v. Yanders, 56 Ohio St., 417.

5. This court has never felt it safe to concede or admit that state or municipal authorities had or could have any judgment, discretion or liberty to make any discretionary rule in interstate or foreign commerce. The utmost that has been permitted to a state or city has been to make pro-

vision for quarantine against diseased persons or animals, or against any kind of danger from explosives, or the like, and such matters as come within the well-defined scope of police power, and even as to these matters the federal courts have been vigilant and strict in denying state or municipal authorities any power that might hinder, obstruct or interfere with interstate or foreign commerce.

In speaking of some of the state authorities, apparently to the contrary, this court said:

"The inquiry they have said was for the legislature and not for the courts. *With this we cannot concur.* The police power of the state cannot obstruct foreign commerce or interstate commerce *beyond the necessity for its exercise*, and under color of it, *objects, not within its scope cannot be secured* at the expense of the protection afforded by the federal constitution. And as its range sometimes comes very near to the field committed by the constitution to Congress it is the duty of the courts *to guard vigilantly against any needless intrusion.*" *R. R. Co. v. Husen*, 95 U. S., 473-474.

In the case of *In re Davenport*, 102 Fed. Rep., on page 543, the court said, citing the above case for the proposition:

"Necessity is declared to be the limit of the power of a state in the enactment of laws of this nature. That is to say, mere rules of convenience which interfere with traffic between states *and which are not necessary as means of self defense, are void*, because they enter within the domain of the power committed by the national constitution to the national government."

In *Crutcher v. Kentucky*, 141 U. S. 59-60, this court observed:

"It does not follow that everything which the legislature of the state may deem essential for the good of society and the well-being of its citizens, can be set up against the exclusive power of congress to regulate the operations of foreign and interstate commerce."

See also *Bowman v. Chicago*, 125 U. S., 490.

"Under the rule that the police power of a state cannot obstruct interstate commerce beyond the necessity for its exercise, state officers cannot accomplish under the protection of a valid law, results which the state is forbidden to accomplish by legislation." *Smith v. Low*, 121 Fed. Rep., 753.

6. The supreme and entire power over foreign and interstate commerce is vested in the Congress of the United States and the states have no concurrent power upon the subject.

"The Congress of the United States shall have power to *regulate commerce with foreign nations* and among the several states and with the Indian tribes."

Constitution of the United States, Article I, Section 8.

"The organization of our state and federal system of government is such that the people of the several states *can have no relation* with foreign powers in respect to commerce or any other subject, *except through the government of the United States*, and its laws and treaties."

Bowman v. Chicago etc. Railway Co., 125 U. S., on page 482.

"The power granted to Congress, to regulate commerce among the states, being *exclusive when the subjects are national in their character*, or admit of only one uniform system of regulation, the failure of Congress to exercise that power in any case, is an expression of its will *that the subject shall be left free from restrictions* or impositions upon it *by the several states*."

Robbins v. Shelby Co. Taxing Dist., 120 U. S., 489, and cases cited;
Atlantic Tel. Co. v. Philadelphia, 190 U. S., 160.

What subjects could be more national in their character than the right of sale and use in each state of the products of the different states and nations?

Earlier decisions in anywise in conflict overruled.
See *Asher v. Texas*, 128 U. S., 129;
LeLoup v. Port of Mobile, 127 Id., 647-8;
Georgia Packing Co. v. Mayor etc., 60 Fed. Rep., 780.

The whole power over foreign and interstate commerce is in the Congress of the United States, and no right of control of such commerce is left in the states, or in any state agency. Under this authority Congress could tax, burden or exclude entirely the commerce of foreign nations or it could favor the import of the products of any one nation over the same product of any other nation. For a particular example, Congress could say, if it would, that no asphalt imported from any foreign country could be sold or used in any road improvement in the United States, or provide that no foreign asphalt except that from the island of Trinidad should be imported to or sold within the United States or be used on a street or road improvement in any city of the United States. Thus it could create a monopoly of the Trinidad Lake asphalt here. This, though, only proves that the power is in nowise vested in the states; and that the exercise of this power by any state or municipality is unauthorized and void and violative of the commerce clause of the Federal Constitution above quoted.

In re Saunders, 52 Fed. Rep., 802;
Hall v. Drain. 95 U. S., 488-489;
Arnold v. Yanders, 56 Ohio St., 417;
People v. Hawkins, 157 N. Y., 1;
The State v. S. S. Constitution, 42 Calif., 578;
Ereman v. Titusville, 153 U. S., 289;
Bowman v. Chicago, etc., Ry. Co., 125 U. S., 490 to 494;
Robbins v. Taxing Dist., 120 U. S., 489;
Walling v. Michigan, 116 U. S., 460;
Webber v. Virginia, 103 U. S., 350-351;
Guy v. Baltimore, 100 U. S., 434,
Railroad v. Husen, 95 U. S., 465;
Henderson v. Mayor, 92 U. S., 260-273;
The Roanoke, 189 U. S., 185.
Instructive extracts from Mr. Webster's great argument in Gibbons v. Ogden. (over)

Mr. Webster's brief reported with case of *Gibbons v. Ogden*, 9 Wheaton 1, the first case before the Supreme Court of the United States involving the meaning and scope of the commerce clause of the Federal Constitution, furnishes us with valuable history and forecasted much of what has been since judicially declared upon the subject. *Inter alia*, he is there reported as saying: "Nothing was more complex than commerce; and in such an age as this, *no words embraced a wider field than commercial regulation.* Almost all the business and intercourse of life *may be connected*, incidentally, more or less, with commercial regulations." (9 Wheaton, pages 9 and 10).

"The right set up in this case under the laws of New York is a *monopoly*. Now, he thought it is very reasonable to say that the Constitution *never intended to leave with the states the power of granting monopolies*, either of trade or navigation; and *therefore that as to this, the commercial power of congress, was exclusive in Congress.*" (Id. page 10).

Few things were better known, than the immediate causes which led to the adopting of the present constitution; and he thought nothing clearer than that the prevailing notion was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different states, and to place it under the protection of a uniform law. * * * The states could still, each for itself, regulate commerce, and the consequence was a perpetual jarring, and hostility of commercial regulation." (Page 11).

"And he insisted that the nature of the case, and of the power, did imperiously require, *that such important authority as that of granting monopolies of trade and navigation, should not be considered as still retained by the states.*" (Id. page 14).

"This doctrine of general concurrent power in the states is insidious and dangerous. If it be admitted, no one can say where it will stop" (Id. page 17).

These observations are profoundly suggestive upon the question now here.

To them may be added the axiomatic proposition: That the commerce clause of the Federal Constitution operates as a part of the organic law of every state and city in this country and as prohibitive of any state law or city ordinance excluding or preferring the purchase, sale or use of the products of one state or country over the like products of other states and countries.

Muscogee Nat. Tel. Co. v. Hall, 118 Fed. Rep., 382.

IV.

The resolutions and ordinances in question respectively specifying that the asphalt used in these pavements "shall consist of genuine Trinidad Lake Asphalt" arbitrarily excluded the like asphalt of any other country, and even of several of our own states, from being used in the pavements ordered, and thereby violated the commerce clause of the Constitution of the United States.*

The parts of the record on which this point is based are:

"Amendment to the tenth charge of the bill," pages 6 and 7, *ante* (Pr. Rec. 22).

Proofs stated and cited in "Section J", pages 28 to 34 *ante*.

Particularly facts and references in paragraph 1 of point III *ante*, pages 86 to 91.

Complainant's assignment of errors numbered 24, 25, 26 and 27 (Pr. Rec. 30)

Complainant has never made any question of the right of the city of Westport to select as paving material stone, wood, brick, asphalt or any other kind of paving material. And where there is a substantial difference in the species of

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*This point and the next attacks the resolutions and ordinances for the pavements as legislative proceedings. The subsequent points are attacks upon the municipal acts as administrative proceedings.

one of these materials, complainant concedes a right of municipal selection and designation between them, e. g. such as cedar rather than hickory, oak or other wood; vitrified brick rather than the ordinary manufacture of brick; sandstone rather than limestone or granite; pitch asphalt as the part of the composition for an asphalt pavement rather than rock asphalt or the converse thereof. These and the like municipal designations of paving material leave no foot print of fraud or interference with commerce and on their face excite no natural suspicion or spirit of inquiry as to the municipal action, as when the material is required to come from a particular place.

Complainant respectfully submits, though, that the right to select as paving material between stone, wood, brick and asphalt as paving material is a very different thing from a right to select the place from which or the person from whom the material shall come.

The liberty of judgment and choice of asphalt as a material for use in street pavement that is claimed for the board of aldermen by the defendant in this case, is not the conceded liberty of choice of asphalt, sand, etc., rather than stone, brick or wood for the pavements, but the liberty to prescribe the place from which the asphalt used in the street pavements shall come; the liberty to exclude the like asphalt from every other place in the world and to exclude all persons but the defendant from commerce with the city of Westport in the matter of asphalt street paving.

(See Sections "J," "K" and "L" *ante*, pages 28 to 48).

Asphalt is an article much used in manufacturing. Varnish is made of asphalt, houses are roofed with an asphalt composition, cellars are cemented therewith, and there are many other uses thereof in individual enterprises. (See "Asphalt," in Encyclopedia Britannica).

Now if a state legislative act should provide that all manufactured varnish, roofing, or cement of asphalt composition, be made of "Trinidad Lake Asphalt" or if such state

legislative act should merely provide that all asphalt other than "Trinidad Lake Asphalt," before it should be put to these uses, should undergo an inspection or be subject to a tax, there could be no kind of doubt that such discrimination against the like asphalt from other places in the world would violate the commerce clause of the Constitution of the United States.

Higgins v. Lime, 130 Mass., 1;
Minnesota v. Barber, 136 U. S., 313;
Brimmerman v. Rebman, 138 U. S., 78;
Voight v. Wright, 141 U. S., 62;
Scott v. Donald, 165 U. S., 93-94;
Collins v. New Hampshire, 171 U. S., 31;
State v. Sante, 111 Iowa, 1.

If a city has the same liberty of purchasing from where and from whom it pleases as an individual, then why does it not follow that a city or the state has a right to the same protection as an individual against its own legislative acts which deny the state or city the freedom of interstate and foreign commerce?

It would seem to be an axiomatic proposition that a legislative act which circumscribed or hampered state or municipal action with interstate or foreign commerce would come equally under the condemnation of the commerce clause of the Constitution of the United States as would such a legislative act in hampering or interfering with commerce of the citizens of a state with other states or foreign countries.

In point, *State ex rel Treat v. Coler*, 166 N. Y., 144; 59 N. E. Rep., 776.
See also *Arnold v. Yanders*, 56 Ohio St., 417; 47 N. E. Rep., 50;
People v. Hawkins, 157 N. Y., 1; 51 N. E. Rep., 257.

A statute of Kentucky in the exercise of state police power, forbade the use of oil for illuminating purposes that

would ignite below a certain temperature and required all oil offered for sale to be previously subject to state inspection. This statute was upheld by the Supreme Court of the United States as a reasonable police regulation and as not violating any interstate commerce right.

Patterson v. Kentucky, 97 U. S., 502.

This decision was reviewed and explained in a later decision of the court as follows:

"*The Kentucky statute prescribed no test* of inspection which, in view of the nature of the property, was either unusual or unreasonable, *or which by its necessary operation discriminated against any particular oil because of the locality of its production. If it had* prescribed a mode of inspection to which citizens of other states, having oils designed for illuminating purposes, and which they desired to sell in the Kentucky market, could not have reasonably conformed, *it would undoubtedly have been held to be an unauthorized burden upon interstate commerce.*"

Minnesota v. Barber, 136 U. S. 327-328.

Mr. Justice Brewer (in a circuit court), declaring void a beef inspection ordinance of the city of Topeka, as violative of the commerce clause of the Constitution of the United States, said:

"The moment you find any act of the legistature or any ordinance of a city, which prevents the free exchange of lawful articles of commerce between the states, you find an act or ordinance which contravenes the commerce clause of the United States Constitution."

Ex parte Keiffer, 40 Fed. Rep. 399 and 402;
See also *Hall v. DeCuir*, 95 U. S. 488;
Georgia Packing Co. v. Mayor etc., 60 Id., 774;
Spellman v. City of New Orleans, 45 Id., 3;
Higgins v. Lime, 130 Mass. 1;
Sayre Boro v. Phillips, 148 Pa. St. 482;
Commonwealth v. Snyder, 182 Pa. St. 633;
State v. Santee, 111 Iowa, 1.

An act of the state of Virginia was entitled, "An Act to prevent the selling of unwholesome meat." This act made it unlawful to sell any beef or mutton slaughtered one hundred miles or more from the place at which it was offered for sale unless it was previously inspected and approved by the local inspectors appointed under that act. It also provided for an inspection fee of one cent per pound, to be paid by the owner of ~~the~~ such meats. There was no provision requiring any inspection of fresh meats from animals slaughtered within one hundred miles from the place at which ~~the~~ such meat was offered for sale. The Act was held void by the Supreme Court of the United States as in violation of the commerce clause of the Federal Constitution because it discriminated against the sale of products of other states in favor of the products and industries of Virginia. Said the court, as the reason for its conclusion:

"The owners of meats here in question, although they were from animals slaughtered in Illinois, had the right, under the constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale."

Brimer v. Rebman, 138 U. S. 78-82.

The Supreme Court of the United States again said:

"Any local regulation, *which* in terms or *by necessary operation*, denies this equality in the markets of a state, is, when applied to the people and products or industries of other states, a direct burden upon commerce and void."

Voight v. Wright, 141 U. S. 67, and cases cited.

The nearest decision to the case at bar is a decision of the Court of Appeals of New York, rendered since this suit was begun. A statute of New York required all stone used in state or municipal work to be cut, dressed and carved within the boundaries of the state of New York, and also provided that all contracts for such public work should contain a like clause; so that both the contract and statute

would exclude from such work stone that came from outside the state; the penalty prescribed by the statute for any violation thereof being a forfeiture of all compensation contracted to be paid for the work. This statute was declared void by the court, in the following words:

"We think that this statute is void, not only for the reason stated in our decision in the case cited, but for the further reason that it is in conflict with the commerce clause of the Federal Constitution. It is a regulation of commerce between the states which the legislature had no power to make. The citizens of other states have the right to resort to the markets of this state for the sale of their products, whether it be cut stone or any other article which is the subject of commerce. *The citizens of this state have the right to enter the markets of every other state to* sell their products, *or to buy whatever they need*, and all interference with the freedom of interstate commerce by state legislation is void. Under the Constitution of the United States, business or commercial transactions cannot be hampered or circumscribed by state boundary lines, and that is the effect of the statute in question."

People ex rel Treat v. Coler, 166 N. Y., on page 150;

Same case is reported in 59 N. E. Rep., 776.

The Federal constitutional provision protects foreign commerce from all state interference precisely to the same extent that it protects interstate commerce from such interference.

Chy Lung v. Freeman, 92 U. S. 275;
Henderson v. Mayor of New York, Id., 268.
"No difference is perceivable between the two."
Crutcher v. Kentucky, 141 U. S., 57-58;
See also *Hall v. DeCuir*, 95 Id., 490.

The Supreme Court of the United States appropriately observed, in declaring the identity and equality of the exclusive power of Congress over foreign commerce with the powers over interstate commerce in the case of *Chy Lung v. Freeman*, *supra*, in the following words:

"If it be otherwise, a single state can embroil us in disastrous quarrels with other nations."

Any state provision which prevents or obstructs a sale, demand or use of an article of foreign or interstate commerce violates the Constitution of the United States.

State ex rel Treat v. Coler (N. Y. Ct. App., March 8, 1901), 166 N. Y. 144, 59 N. E. Rep., 776;
Brennan v. Titusville, 153 U. S. 301-302;
Spellman v. New Orleans, 45 Fed. Rep., 3;
Ex parte Keiffer, 40 Id., 399;
Arnold v. Yanders 56 Ohio St. 417; 47 N. E. Rep., 50;
People v. Hawkins, 157 N. Y. 7-8, 15-16;
In re Davenport, 102 Fed. Rep., 541-543;
Schollenberger v. Pennsylvania, 171 U. S. 1;
Scott v. Donald, 165 U. S. 58, 93-4, 100;
Vance v. Vandercook Co. No. 1, 170 U. S. 439;
Bowman v. Chicago Ry. Co., 125 U. S. 499;
Colling v. New Hampshire, 171 U. S. 31;
Crutcher v. Kentucky, 141 U. S. 47;
Tiernan v. Rinker, 102 U. S. 126.

"There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country; *the one would be a necessary sequence of the other.* No goods would be imported if none could be sold."

Brown v. Maryland, 12 Wheaton, page 439.
(See also authorities above cited.)

The same idea is reiterated in another part of the same opinion as follows:

"Commerce is intercourse, one of the most ordinary ingredients is traffic. *It is inconceivable, that the power to authorize this traffic*, when given in the most comprehensive terms, with the intent that its efficiency should be complete, *should cease at the point when its continuance is indispensable to its value.* To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It

is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. *It must be considered as a component part of the power to regulate commerce.*"

Brown v. Maryland, 12 Wheaton, pages 446-447.
See also *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 242-243;
People v. Hawkins, 157 N. Y. 8.

The freedom to use an article of interstate or foreign commerce is also protected by the commerce clause of the Constitution.

Scott v. Donald, 165 U. S. 100;
Vance v. Vandercook Co. No. 1, 170 U. S. 439.

The Supreme Court of Indiana, in holding a legislative act in that state void for violating the commerce clause in question, said:

"It is not in the power of the legislature *to prevent* one citizen from buying or another from selling property. The rights of property are not subject to such absolute legislative control."

State ex rel Corwin v. Oil, Gas & Mining Co., 120 Ind., 583.

What is the effect of the specification of the material to be used on a street pavement, by the place from which it comes, if not to prevent the sale of the same product coming from other places?

"The matter of interstate commerce is a national matter *with which states can in nowise interfere*. The jurisdiction of the Federal government *absolutely excludes* the state from directly or indirectly hampering or taxing commerce between the states."

The State ex rel Carr v. Sleeping Car Co., 114 Ind. 159.

"No sort of trade can be carried on between this country and any other, to which this power does not extend."

Gibbons v. Ogden, 9 Wheaton, bottom of page 193.

"We think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

Hall v. DeCuir, 95 U. S. 488.

It was not necessary to the invalidity of the resolutions and ordinances that asphalt from another place than Trinidad Lake should be in the city of Westport or *in transitu* to that place when the resolutions were adopted excluding any such asphalt from use in the pavements.

Hall v. DeCuir, 95 U. S., 488-489;
McCall v. California, 136 U. S., 104.
"No goods would be imported if none could be sold."
Brown v. Maryland, 12 Wheat., 438, 446-7.

A city can have no more right than a state to discriminate against articles of interstate or foreign commerce.

Guy v. Baltimore, 100 U. S. 434;
Ex parte Keifer, 40 Fed. Rep., 399;
Spellman v. New Orleans, 45 Id. 3;
Brennan v. Titusville, 153 U. S. 301-2;
Penn Mut. Life Ins. Co. v. Austin, 168 Id. 685;
Georgia Packing Co. v. Mayor etc., 60 Fed. Rep., 774.

"The law recognizes in no one a right to create or maintain a monopoly."

Keene v. Mayor, 101 Ga. 592;
See also *City of Atlanta v. Stein*, 111 Ga. 789;
Town of Kirkwood v. Merimac Highlands Co., 94 Mo. App., 637;
State v. Santee, 82 N. W. Rep., 445, *s. c.* 111 Iowa, 1;

Diamond v. City on Mankato, 88 Minn. ——, 93 N. W. Rep., p. 911;
Reddersheimer v. Meyer, 52 La. Ann. 2089;
City of Chicago v. Rumpf, 45 Ill. 90;
City of Lakeview v. Tate, 130 Id. 247;
Fishburn v. City of Chicago, 171 Ill. 338;
Dillon on Mun. Copr. (4th Ed.) Secs. 322, 325, 329, 362, 694 and 695;
Brook v. Cooper, 50 N. J. Eq,, 761.

If the legislature of the state of Missouri had stated in the charter of cities of the fourth class (Westport is a fourth class city, *ante* page 21) that such cities shall pave their streets with asphalt from Trinidad Lake, it is clear such statute would violate the commerce clause of the Constitution of the United States, because of the discrimination in favor of "Trinidad Lake asphalt" against the like asphalt of Cuba, Mexico, Venezuela and other foreign countries, and against the asphalt abounding in California, Utah and Texas of our own country. This proposition is clear.

People ex rel Treat v. Coler, 166 N. Y., 144;
Minnesota v. Barber, 136 U. S., 313;
Bremmer v. Rebman, 138 U. S., 78;
Voight v. Wright, 141 U. S., 62;
Guy v. Baltimore, 100 U. S., 443.

It must therefore follow that the city of Westport, the creature of the state legislature, could not do, as against the asphalts of other places, what the state legislature could not do or authorize in terms to be done.

"The power of a municipal corporation to enact by-laws being delegated by the legislature cannot, of course, be more extensive than the power of the delegating body. Consequently the by-laws or ordinances enacted by the council must not be in contravention of the Constitution of the United States." (Beach on Public Corporations, Sec. 506).

"If a state, with its recognized power of sovereignty, is impotent to obstruct interstate commerce can it be said any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?" (*Addyston Pipe & Steel Co. v. U. S.*, 175 U. S., 230).

"What a state may not do it may not authorize a city to do." (*Georgia Packing Co. v. Mayor, etc.*, 60 Fed. Rep., 779).

"The state cannot confer upon the subordinate agencies of the government powers it does not possess and cannot exercise." (*Town of Greensboro v. Ehrenreich*, 80 Ala., 582).

"When the state creates a city or borough it cannot confer upon the municipality powers that the state does not possess. It cannot confer upon the creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation as truly as the town or village was a part of the state before it acquired a charter. *It can have no better right to adopt discriminating trade regulations than the state has.*" (*Sayreborough v. Phillips*, 148 Pa. St., 489).

"The charter rights of Kansas City cannot exceed the power of the people of the state through their legislature." (*Barber Asphalt Paving Co. v. Ridge*, 169 Mo. l. c., 387).

"A board of education can exercise no greater power than the legislature can confer upon it." (*Adams v. Brennan*, 177 Ill., 194).

The last case is entitled to especial notice. It involved the right of a board of directors of a school district to make a contract for the building of a public school with the provision that only union labor should be employed in the construction of the building. The Supreme Court of Illinois, commenting upon and deciding adversely to such power of the school board, and as its reason for such adverse decision said:

"It is unquestionable that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should, by a statute, undertake to require this board,

as the agency of the state in the management of school affairs in the city of Chicago, to adopt such rule or insert such provision in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the constitution of the state. If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state, in its sovereign capacity, through its legislature, could not enact such a provision. (*Millett v. People*, 117 Ill., 294; *Frorer v. People*, 141 Ill., 171; *Braceville Coal Co. v. People*, 147 Ill., 66; *Ramsey v. People*, 142 Ill., 380; *Ritchie v. People*, 155 Ill., 98; *People v. Live Stock Exchange*, 170 Ill., 556.) There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the board entertained a *bona fide* opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be attained; or that the members of some church, on account of their higher standing or morality, would more faithfully and conscientiously carry out the contract. The fact that the board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders, and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work. There seems, however, to be a claim that the board of education, although it could not be lawfully required or authorized to make such a contract, may have some sort of discretion to do so; and the only question in the case on the subject of the validity of such contract is whether the board possesses power beyond that of the legislalure, in which is invested the entire legislative authority of the state. Upon what theory it could be claimed that this board of education, which exercises merely the function of the state in maintaining public schools within a limited portion of the state, can possess either power or discretion which the state in its sovereign capacity could not confer upon it, we are unable to imagine. No argument is made which would justify such a conclusion. *There can be no greater power of the board to act of its own motion than*

by virtue of positive law. The results in either case are equally in conflict with the organic law, and such legislation, contract, or action, whatever form it may take, is void." (177 Ill., 199-200.)

Nor does it make any difference that a resolution or ordinance questioned, affects only the pavement of a single street or a part of a street, it is void, if it in the smallest degree exercises a function belonging to the Congress of the United States.

"Questions of power *do not depend* on *the degree* to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. The question is, *where does the power reside;* not how far it will be probably abused; *and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.*"

Brown v. Maryland, 12 Wheaton, on page 439;
See also Id., end of page 447;
Smith v. Southwestern Ry. Co., 181 U. S., 255;
People v. Raymond, 34 Calif., 499;
State v. North & Scott, 27 Mo., 480;
State v. Portland Gas Co., 153 Ind., 489;
Bailey v. Master Plumbers, 103 Tenn., 114;
Nester v. Brewing Co. 161 Pa. St., 473, 481;

Of the validity of a by-law of the Plumbers Association of Memphis, under the Tennessee anti-trust act, the Supreme Court of that state said:

"It is not the number of persons participating in the by-law, or *extent of the territory included*, but the injury to the public in that territory, *however restricted*, that characterizes the interruption of trade as illegal."

Bailey v. Master Plumbers 103 Tenn., 114.

"The shortness of the road does not change its character. The restriction is not against great works but against all works of that kind."

Hubbard v. Township, 25 Mich., 155,

"The Government of the United States, within the scope of its power, operates *upon every foot* of territory under its jurisdiction."

Roberts v. Northern Pacific R. R., 158 U. S., 21, and cases cited.

"The power of the National Government over commerce with foreign nations and among the several states is broad and comprehensive. It reaches the interior of every state in the union, so far as it may be necessary to protect the products of other states and countries from discrimination by reason of their foreign origin." *Brown v. Maryland*, 12 Wheat., 419;

Guy v. Baltimore, 100 U. S., 442.

Thus it is made clear that when the city enacts a resolution or ordinance covering only a single street or part of a street, that such action is as much responsible to Federal law, and to defeat thereby, as if such resolution or ordinance included the whole of every street in the city.

The legislature of the state of Michigan authorized the City of Detroit to own and operate its street railways. This act was held void as violating a provision of the state constitution forbidding the state to engage in any internal improvement. Said the Supreme Court of the state thereon:

"If the legislature may authorize the city of Detroit to enter into the proposed arrangement, it may authorize any other municipality to do so, and, by concert of action between the various municipalities, they may cover the state with the means of rapid transit, owned and operated by the municipalities. This would enable the state to do by means of agencies called into being by itself, what it cannot itself do, and what the Constitution forbids its doing."

Attorney General v. Pingree, 120 Mich., 570.

If a city could discriminate in its legislative capacity in favor of or against a particular paving material of one state over the like product of other states, as to a single street pavement, but not as to all in one legislative act, it could, by paving only one street at a time, with the products of a

specified state or nation, exclude the like products of all other states and nations until all of its streets were paved, and in that way evade the control and limitation of our Federal Constitution. A state or city cannot thus accomplish indirectly what is forbidden to be done by it directly. It is a sacred duty of the courts of the country to prevent the success of any evasive legislation.

Passenger Cases, 7 How. (U. S.), on page 458;
Parret's Chinese Case, 6 Sawyer (Fed.), 350, 382;
People v. Raymond, 34 Calif., 492;
Gotcher v. Burrows, 9 Hump. (Tenn), 588 *et seq;*
Jarrott v. Moberly, 103 U. S., pages 585 and 586;
People v. Hawkins, 157 N. Y., 8;
Fishburn v. Chicago, 171 Ill., on pages 343-4;
State v. North & Scott, 27 Mo., 464.

The same argument and authorities answer equally and fully the possible suggestion that the total asphalt (foreign material) used in the street pavement cannot exceed 15 per cent of the 2½ or 3 inches of the crest of the pavement. (*Ante*, page 31).

The natural tendency of such specification was to make all of the work cost more money, and it therefore vitiates the proceedings.

Matter of Petition of Laura E. Eager, 46 N. Y., 106-107;
McMullen v. Hoffman, 174 U. S., 648 to 651.

Complainant being an owner of property charged with the cost of the improvement has a right to invoke the protection of the commerce clause of the Constitution of the United States against the resolutions and ordinances in question and to complain of the exclusion of the asphalt from elsewhere and of paving contractors other than the defendant from coming in competition for the pavements in question. For the commerce clause of the Constitution of the United

States was intended for the benefit of the purchasers and users as much as for the importers and vendors of any article of interstate or foreign commerce. This has been expressly recognized and enforced in this court and recently in the New York Court of Appeals.

Said this court in *Minnesota v. Barber*, 136 U. S., on page 326:

"The people of the state of Minnesota have as much right to protection against the enactments of that state interfering with the freedom of commerce among the states, as have the people of other states." (See also *Scott v. Donald*, 165 U. S., 98, and *People ex rel Treat v. Coler*. 166 N. Y., on page 150.

V.

The resolutions and ordinances for the street pavements required contracts which were in restraint of interstate and foreign trade and commerce and therefore violated the act of Congress of July 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

(See this act of Congress printed in convenient form, 166 U. S., 291).

The parts of the record on which this point is based are the following:

"Amendment to the tenth charge of the bill," *ante* 6 (Pr. Rec. 22).

Resolutions and ordinances quoted and cited in "Section J", *ante* 28.

Complainant's assignment of errors No. 19 and No 20. (Pr. Rec. 29.)

Section 1 of this anti-monopoly act of Congress declares every alleged contract in restraint of trade or commerce among the several states or with foreign nations, illegal, as follows:

"Sec. 1. *Every contract*, combination in the form of a trust or otherwise, or conspiracy, *in restraint of trade or commerce among the several states, or with foreign nations*,

is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

The resolutions and ordinances for the pavements did not authorize a contract for the work which would permit the like asphalt from other places than Trinidad Lake to be used in the pavement, for with the specific provision therein that the asphalt used in such pavements should be "Trinidad Lake asphalt", the contract, which was required by municipal law to follow the resolutions and ordinances, could make no other or different requirement.

King Hill Brick Mfg. Co., v. Hamilton, 51 Mo. App., 120;
Partridge v. Lucas, 99 Calif., 519;
Piedmont Paving Co. v. Allman, 136 Id., 88.

It must therefore be said that the resolutions and ordinances required contracts for the pavements which were prohibited by this anti-monopoly act of Congress and were therefore void.

The case of *Pensacola Tel. Co. v. West, etc. Tel. Co.*, 96 U. S., 1, is instructive if not conclusive on this point. The decision in that case construed an act of Congress concerning telegraph companies, which was held to be an act governing interstate commerce and to nullify a legislative act of the state of Florida which had undertaken to create a monopoly in favor of the Pensacola Telegraph Co. Referring to that act of Congress the court said "the statute of July 24, 1866, in effect, amounts to a prohibition of all state monopolies in this particular." So it may be as truly said in this case, that section 1 of the anti-monopoly act of Congress of 1890 which declared illegal every contract in restraint of trade among the several states or with foreign nations "in effect amounts to a prohibition of all state monop-

olies in this particular," and nullifies all state statutes or city ordinances as well as contracts making a contrary provision.

See also *Henderson v. New York*, 92 U. S., 272;
Muscogee Tel. Co. v. Hall, 118 Fed Rep., 382.

Judge Dillon, in his work on Municipal Corporations (4th Ed.) says:

"SEC. 329. The rule that a municipal corporation can pass no ordinance which conflicts with its charter, or any general statute in force and applicable to the corporation, has been before stated. *Not only this, but it cannot*, in view of its incidental power to pass by-laws, or under any general grant of authority, *adopt by-laws which infringe the spirit, or are repugnant to the policy of the state*, as declared in its general legislation."

See also *Wood v. Kansas City*, 162 Mo., 309.

The undoubted policy of the act of Congress was to prevent any monopoly or restraint of trade or commerce among the several states or with any foreign nation. The purpose of the resolutions and ordinances is repugnant to that policy, because they make a monopoly of the asphalt of the Trinidad Lake for the pavements.

The resolutions and ordinances in question are *ultra vires* and void, because they required contracts for the pavements which were in restraint of interstate and foreign trade and commerce, contrary to the Act of Congress.

State v. Distilling Co., 29 Neb., 700;
Master Plumbers v. Memphis, 103 Tenn., 99;
San Antonio Gas Co. v. State of Texas, 54 S. W. Rep., 289;
Lowry v. Tile, Mantle & Grate Assn., 106 Red Rep., 38;
Lowry v. Tile, Mantle & Grate Assn., on appeal, 115 Fed. Rep., 27.

The doctrine laid down in the cited quotation from Judge Dillon is exactly in line with the decisions of this court, and other courts, that contracts prohibited by statute are void because contrary to public policy, as manifested by such statute.

Bement v. National Harrow Co., 186 U. S., 88;
United States v. Freight Assn., 166 U. S., 340-1;
Miller v. Ammon, 145 U. S., 421-427;
Cooper Mfg. Co. v. Ferguson, 113 U. S., 733;
Hanover v. Doane, 12 Wall, 342-348;
Kirhen v. Milcher, 43 Fed. Rep., 644;
Chicago St. P. & M. Ry. Co. v. Wabash N. L. & P. Ry. Co., 61 Id., 997;

And this is true though such illegality of the contract is made to appear by evidence *aliunde*.

McMillan v. Hoffman, 174 U. S., 653;
Sprague v. Rooney, 104 Mo., 349.

VI.

The contracts specified "Refined Trinidad Lake asphaltum" as the asphalt required to be used in the pavements, and were vitiated by such specification under the anti-monopoly act of Congress aforesaid.

The parts of the record on which this point is based are the following:

"Amendment to the tenth charge of the bill", (*ante* page 6).

Trinidad Lake asphalt provision in the contracts, (*ante* pages 30-31).

Complainant's assignment of errors, No. 16 and No. 17 (Pr. Rec. 28).

Congress had the right to prohibit all contracts in restraint of interstate or foreign trade. In *Addyston Pipe & Steel Co. v. United States*, 175 U. S., on page 229, this court said:

"If certain kinds of contracts directly as already stated, limit or restrain, and hence regulate interstate commerce,

why should not the power of Congress reach these contracts just the same as if the legislation of some state had enacted the provisions contained in them?"

Section 1 of the act of Congress in question declares every contract in restraint of trade or commerce among the several states or with foreign nations to be illegal, and provides that every person entering into such a contract shall be guilty of a misdemeanor punishable by fine or imprisonment, or by both fine and imprisonment.

The contracts for the pavements, with "Trinidad Lake asphalt" specification, being thus prohibited by this anti-monoply act of Congress, they are void. This proposition is sustained by the authorities cited at the top of page 123.

The contracts for the pavements being void, the tax-bills are therefore void.

Capron v. Hitchcock, 98 Calif., 430;
Brady v. Bartlett, 56 Id., 350;
Kiley v. Oppenheimer, 55 Mo., 374.

VII.

The specification in the resolutions, ordinances and contracts for the pavements in question, that they should "consist of a genuine Trinidad Lake Asphalt pavement" was due to a conspiracy or combination between defendant and the Westport city authorities, in violation of the anti-monopoly act of the Congress of the United States.

The parts of the record on which this proposition is based are:

1. Allegations of the "tenth" charge of the bill, (*ante* page 6).
2. "Amendment to the tenth charge" of the bill, (*ante* pages 6-7).
3. Sections "K" and "L" of the testimony cited, (*ante* pages 34 to 48).
4. Complainant's assignment of errors No. 20 and No. 21, page 29 Pr. Rec.

A municipal corporation is "a person" and may be a conspirator within the meaning of the anti-monopoly act of Congress of 1890. (See section 8 thereof).

See also *Ochs v. People*, 124 Ill., 399;
Madden v. State, 59 N. J. L., 324;
People v. Duke, 44 N. Y. Supplement, 336;
Oakland v. Carpenter, 13 Calif., 540.

This point is based upon the provision in Section 1 of the act of Congress, against any "combination" or "conspiracy in restraint of trade" etc. (This section is quoted *ante* pages 120-121).

This act of Congress includes all forms of combinations and conspiracies in restraint of trade. "Combinations are condemned not only when they take the form of trusts, but in whatever form found if they be in restraint of trade or commerce." (*United States v. Debs*, 64 Fed. Rep., 747).

All of the law writers have defined conspiracy as follows: "An agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means." The conspiracy charges in this case are as to the "Trinidad Lake asphalt" specification made in the resolutions, ordinances and contracts for the pavements in question.

"Conspiracies are odious in law and are always taken *mala parte*, and properly." (*The State v. Buchanan*, 5 Harris & J., (Md.) 354).

A combination to prevent competition is an unlawful act, a fraud and a conspiracy.

Brown v. Jacobs Pharmacy Co., 115 Ga., 433-443;
McMillan v. Hoffman, 174 U. S., 649;
Bailey v. Association of Plumbers, 103 Tenn., 99;
San Antonio v. State, 54 S. W. Rep., 289;
Adams v. Breman, 177 Ill., 202;
Foss v. Cummings, 149 Ill., 353;
Fishburn v. Chicago, 171 Ill., 338;
Elkhart Co. Lodge et al v. Carey, 98 Ind., 238;

Nester v. Continental Brewing Co., 161 Pa. St., 473;
Morris Coal Co. v. Barclay Coal Co., 68 Pa. St., 174;
State ex rel Snyder v. Natural Gas and Oil Co., 153 Ind., 483;
M. Taggart v. Harrison, 12 Kansas, 62;
Chapin Bros. v. Horn Bros., 83 Ia., 156;
Hoffman v. McMullen, 83 Fed. Rep., 372; affirmed 174 U. S., 639;
Gibbs v. Smith, 115 Mass., 592.

The city resolutions, ordinances and contracts for the asphalt street pavements which specified "Trinidad Lake Asphalt" for such pavements, *pro tanto*, excluded as commerce the asphalt from every place in the world, except the Trinidad Lake in the island of Trinidad; and where, as shown in this case, the defendant has and had at the times in question a monopoly of "Trinidad Lake asphalt" pavement in Westport, Mo., such specification also excluded all other paving contractors of the entire world from getting or doing the pavements in question. Such specification of "Trinidad Lake asphalt" thus preventing competition in interstate and foreign trade and commerce operated directly and not remotely upon such trade and commerce and was therefore prohibited by the act of Congress.

United States v. Joint Traffic Assn., 171 U. S., 575-577;
Chesapeake & O. Fuel Co. v. U. S., 115 Fed. Rep., 610, 623-624;
Gibbs v. McNealy, 118 Fed. Rep., 120;
United States v. Swift & Co., 122 Fed. Rep., 529.

It is not necessary howeverthat the effect of a law, ordinance or contract should entirely prevent all competition in trade and commerce to make it void under the act of Congress.

United States v. Chesapeake & Ohio Fuel Co., 105 Fed Rep., 93;
Same case on appeal, affirmed, 115 Fed. Rep., 610, 623-4;
Texas Standard Oil Co. v. Adone, 83 Tex., 650;
Bailey v. Master Plumbers, 103 Tenn., 99;

It is no answer to the charge of conspiracy in this case that the testimony fails to show that the city authorities and petitioning resident owners received any money or other valuable consideration from the defendant for making the specification for Trinidad Lake asphalt for the pavements in question. It may be that the only consideration received or hoped for by the Westport board of aldermen was political favor from Hugh J. McGowan, or his assistants, or it may be that they yielded to the blandishments and importunities of McGowan or his assistants because they were so weak and irresponsible as not to understand that it was their duty to represent and protect, and not betray, the non-resident owners and non-petitioning resident owners of abutting lands; but when they became, as the testimony shows, mere spokes in the wheel of Hugh McGowan's scheme to monopolize asphalt street pavement in the city of Westport for the defendant they became his conspirators, whether they received a valuable consideration for their action or were only good fellows in the part they played in the plot.

Ochs v. People, 124 Ill., 400;
United States v. Newton, 52 Fed. Rep., 275;
Stoval. v. F. & M. Bank, 8 Smedes & Marshall, (Miss.), 306;
United States v. Chesapeake & O. Fuel Co., 105 Fed. Rep., 93;

One of defendant's attorneys, examined as a witness by complainant, conceded that no petition of resident property owners was required by the Westport charter to authorize municipal proceedings to pave a street (Pr. Rec. p. 45; see also testimony of Geo. L. Love, city clerk, Id., p. 73).

The testimony stated and cited in Sections "K" and "L" is conclusive of the alleged conspiracy. (See *ante*, pp. 34 to 48)

If there was no combination or conspiracy between the defendant's agents and the board of aldermen of Westport

in the matter of contracting for street paving and the specifications of Trinidad Lake asphalt, then:

(1) Why did the board of aldermen of Westport wait in each instance, before deeming or declaring a street pavement necessary, for the defendant's agents to procure the signatures of resident owners of the abutting lands to a petition asking for such pavement, when such petition was wholly unnecessary?

(2) Why was the preliminary resolution declaring a Trinidad Lake Asphalt pavement necessary always adopted by the board of aldermen whenever a petition therefor, signed by resident property owners was presented by the agents of the defendant?

(3) Why were no questions ever asked as to how these signatures were obtained?

(4) Why all of the colorable and unnecessary action?

In *Baldwin v. Whitcomb*, 71 Mo., 659, the Supreme Court of Missouri held and said:

"There is another point in this cause not to be overlooked in considering the charges of fraud which plaintiff makes. The law in respect to judgments for specific performance, when ordered by county courts, requires, as before stated, that the petition be verified by affidavit of the petitioner. No other affidavit is required. Yet we find underneath the statement that the petition was 'sworn to in open court,' the affidavit of James H. Bridges, made before Whitcomb, in which Bridges swears to the truth of the petition, and also that 'to his knowledge, no part of the within contract has been satisfied, except as stated in the petition.' What was the object of such additional and unwarranted affidavit? Its only purpose could have been to give an appearance of fairness—a color of verity and validity to the transaction—for the petition is signed by Whitcomb and not by an attorney; and having long been clerk of the county court, it may well be presumed that he was thoroughly conversant with the statutory provisions, and knew that the affidavit of Bridges added neither verification nor force to the petition. The unnecessary affidavit of Bridges would, therefore, seem to bring this case within the principle of the

maxim: '*Conusulae inconsuetae semper inducunt suspicionem.*' For, whenever fraud is the matter in issue, any unusual clause in an instrument, any unusual method of transacting the business, apparently done with the view for effect and to give to the transaction an air of honesty, is of itself a badge of fraud. For, 'when the part is overacted the delusion is broke and the fiction appears.' *Comstock v. Rayford*, 12 Sm. & Marsh, 369. This has been the rule ever since Twyne's case, 3 Coke, 81, where it was held a circumstance of grave suspicion that a clause in the conveyance recited that the gift was made honestly, truly and *bona fide.* Bump. Fraud. Convey., 50 *et seq.*, and cases cited.

Many of the circumstances above detailed, would not, perhaps, *when singly considered*, be sufficient to carry conviction to the mind that fraud had been perpetrated, but they each have a decided tendency in that direction.''

It would be no fair judgment of the repeated acts of Hugh McGowan or his assistants in concert with the board of aldermen of Westport in the 15 asphalt street pavements laid by the defendant in Westport, to consider and judge such acts, as if done for only a single pavement; the conclusive circumstance of the conspiracy is the uniformity of responsive action of the board of aldermen to the scheme and beguiling of McGowan or his assistants as to all and each of the 15 asphalt street pavements contracted for and laid by the defendant in the city of Westport.

The fact of Hugh J. McGowan, or his assistants, hovering around and circulating among the aldermen of Westport before the session of the board; the fact of their attending each session of the board of aldermen of Westport whenever the adoption of a resolution or an ordinance for an asphalt pavement with the ''Trinidad Lake asphalt'' specification was brought before the board of aldermen; the fact that the board of aldermen never by resolution declared an asphalt street pavement necessary, except upon petition of residents procured and presented by Hugh J. McGowan, or his assistants; the fact that the board of aldermen always by resolution declared necessary an asphalt street pavement and

specified "Trinidad Lake asphalt" for such pavement whenever such petition and resolution was presented by Hugh J. McGowan, or his assisstants, though such petition was not required by the charter of Westport; and the fact that such resolution was always followed by an ordinance ordering the work and specifying "Trinidad Lake Asphalt" and by a contract with the defendant, in the 15 or 16 asphalt pavements laid in Westport, conclusively proves the alleged conspiracy in the making of such specification. *Res ipsa loquitur.*

Charges of criminal conspiracy against the public have been submitted to juries on less testimony of the guilt of the accused than has been shown in this case as sufficient testimony on which to base a conviction.

Mussle Slough case, 5 Fed. Rep., 680;
Reilley v. United States, 106 Fed. Rep., 896;
United States v. Howell, 56 Fed. Rep., 21;
Drake v. Staurt, 76 Fed. Rep., 140;
The People v. Mather, 4 Wend., 229;
Morris Coal Co. v. Coal Co., 68 Pa. St., 174;
Ochs v. The People, 124 Ill., 400;
San Antonio Gas Co. v. State, 54 S. W. Rep., 289;
McKee v. State, 111 Ind., 378-385;
State v. Brown, 109 Mo., 648;
State ex Inf. v. Fireman's Fund Ins. Co., 152 Mo., l. c. 40.

"As has been often remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicate with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient."

Reilley v. United States, 106 Fed. Rep., 905;

"It is not necessary to prove that the defendants came together and actually agreed, in terms, to have that design (a conspiracy) and to pursue it by common means. If it be proved that the defendants pursued by their acts the same

objects, *often by the same means*, one performing one part and another another part of the same so as to complete it with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to affect that object."

Mussle Slough case, 5 Fed. Rep,, 680.

In *State ex inf. v. Fireman's Fund Ins. Co.*, 152 Mo., on page 40, construing the Missouri State anti-trust act, and as determinative of the *quantum* of proof required in such a case, the Supreme Court of Missouri said.

"When people set out to do acts that are either *mala in se* or *mala prohibita* they do not put a sign over the door or a stamp on the act declaring their purposes and intent. Concealment is generally their prime object. But as such matters exist without agreements and rest upon common understanding and practice, so the proof of their existence may be of the same character, and while such laws are penal in their nature and should be strictly construed (*State ex rel v. Talbot*,, 123 Mo., 69; *State ex inf. v. Bland*, 144 Mo., 534), nevertheless a pool or trust may be as conclusively proved by facts and circumstances as by direct, written evidence, for in this regard they are like all other frauds, and as was well said by Campbell, J., in *Webber v. Jackson*, 79 Mich., l. c. 180: 'While fraud is not to be assumed without proof, it is nevertheless oftener shown by circumstances than any other way. When things appear that are contrary to the ordinary ways of honest business men, and call for explanations which might be, but are not, given, it is no violent inference to conclude that there is something wrong. *And where this occurs repeatedly*, and is the general characteristic of the conduct and statements of the parties, it is their own fault if they are held to the consequences.'"

See also equally to the same effect:
State ex inf. v. Armour Packing Co., 173 Mo., 356.

The parties who were charged in complainant's bill as guilty of this combination and conspiracy were not brought forward by defendant as witnesses in this case. Not a single alderman was offered as a witness to deny the charge of

conspiracy. Hugh J. McGowan, the head of this alleged conspiracy, was not called as a witness by defendant. The attorneys for the defendant and the employees of Hugh J. McGowan, and all other witnesses who were examined on this issue, were called by the complainant. Hugh J. McGowan resided in Indianapolis when the depositions herein were taken. The defendant's attitude was not to question or cross-examine a single statement of any witness on this issue lest something might be brought out which the complainant had failed to elicit, and the defendant's attorney, and the employees of Hugh McGowan, several times took refuge from complainant's questions on this issue, by declining to answer them. While the defendant has been thus reclusent on this issue the court will observe the vigorous contest on other issues of fact made by defendant in the testimony. For example, note the cross-examination of the witness, George L. Love, city clerk of Westport, and John C. Tate, on the issue not here involved as to the delivery of the Wyandotte St. and Baltimore Av. tax-bills; (Pages 78 to 81 also page 93) the defendant took the complainant to Chicago to take the deposition of Elbert B. Peck, one of defendant's employees, on that issue. (See unprinted testimony, transcript, 481).

The same is also true of other issues in the case, notably the issue in the "Amendment to the Eighth" charge of the bill, not here in the issue. The printed record in this case shows that the defendant took 60 pages of testimony on that issue. (Pages 359 to 406). On the issue tendered in defendant's answer of benefit to complainant's property the defendant took depositions of five witnesses. (Pages 286-326-354-375-396.) This action of the defendant shows the idea of defendant's attorneys of the facts of the case, viz: Where defendant considered that it had or could produce testimony on any issue tendered in the case there is no absence of cross-examination or attempt at producing testimony. Such a course on defendant's part is significant and

warrants the court in concluding that the facts on the conspiracy issue are against the defendant.

Runkle v. Burnham, 153 U. S. ., 228.

In *Sauntry v. United States*, 117 Fed. Rep., 135, the court said:

"It is said by Mr. Starkey in his work on evidence, (Vol. I, p. 546): 'The conduct of a party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his knowledge, frequently affords occasion for presumption against him since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.' 'We think that the case now under consideration affords a proper occasion to invoke this principle in the law of evidence.' "

See also *Kirby v. Talmadge*, 160 U. S., 379;
Glespie v. Keator, 56 Fed. Rep., 206;
Baldwin v. Whitcomb, 71 Mo., 658;
Mabary v. McClurg, 74 Mo., 575.

This rule was recently applied in enforcing the Missouri state anti-trust act.

State ex inf. v. Armour Packing Co., 173 Mo., 356.

The case of *Boon v. City of Utica*, 5 Miscellaneous, (N. Y.), 402, affords a glimpse of the like perversity and illegal action of a municipal board of aldermen in sticking too closely to the "Trinidad Lake asphalt" specification.

See also *Fishburn v. Chicago*, 171 Ill., 338;
Diamond v. City of Mankato, [illegible] Minn., 93 N. W. Rep., 911;
Riddersheimer v. Meyer, 52 La. Ann., 2089.

The resolutions, ordinances and contracts for the pavements are void for the reasons given in this point.

Other acts of Conspiracy and Monopoly competent testimony.

The acts of conspiracy and monopoly and attempted monopoly of asphalt pavement and the use of "Trinidad

Lake asphalt," by defendant in Kansas City at and before the times in question, shown by the testimony, are competent testimony on the issues of the defendant's alleged conspiracy and monopoly in the pavements of Westport here in question.

Lincoln v, Claflin, 7 Wall, (U. S.), 132;
United States v. Kenney, 90 Fed. Rep., 258;
Rex v. Roberts, 1 Campbell (Eng.), 399;
Luckey v. Roberts, 25 Conn., 486;
Gordrus v. Preston, 2 Day (Conn,), 205;
State v. Burnham, 15 N. H., 396-7;
McKee v. State; 111 Ind., 378.
State v. Soper, 118 Iowa 1.
12 Wall 456; 117 U. S. 591; 23 How 172.

VIII.

Defendant attempted to monopolize and monopolized "Trinidad Lake Asphalt," and contracts for its use in street pavement in Kansas City and Westport, Missouri, and thereby secured the contracts for the pavements in question, in violation of the anti-monopoly Act of Congress aforesaid.

This point is based upon the following parts of the record:

"Amendment to the Tenth charge of the bill," *ante*, 6.

Proof stated and cited in "Section K," *ante*, 34 to 41.

Complainant's assignment of errors, No. 22 and No. 23. (Pr. Rec. 30).

The provision of the Act of Congress on which this point is based, reads as follows:

"SEC. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.'

The obvious differences between this section and Section 1 of this Act of Congress are these:

Section 1 of the Act of Congress declares every contract illegal which is in restraint of interstate or foreign trade, and every person guilty of a misdemeanor who shall make any such contract or engage in any combination or conspiracy in restraint of such trade or commerce. Two people are required to violate any provision of this section.

Section 2 makes any person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, guilty of a misdemeanor, to be punished by a fine, etc. This section may be violated, though there be neither a trust combination nor conspiracy. That is to say, one party alone can violate the provision of Section 2, which prohibits acts of monopoly.

People v. Duke 44 N. Y., Supplement, 336.

And by the terms of this provision (Section 2) it is not necessary to a violation thereof that a party should be shown to have any actual monopoly. If a party shall so conduct himself as to convince the people of any city or state that they can have the benefit of any particular interstate or foreign trade or commerce, only, by dealing with or through him, he is undoubtedly guilty of an attempt to monopolize such trade, a violation of this provision (Section 2) of the anti-monopoly Act of Congress, although he may in fact have no monopoly of such trade or commerce, and all of his pretenses thereof were false. Such pretenses are, essentially, attempts at monopoly of such trade and commerce prohibited by this provision (Section 2).

The testimony conclusively shows: That the defendant's agents had the common council of Kansas City and the board of aldermen of Westport fully convinced that the defendant had a complete monopoly of "Trinidad Lake asphalt" and of its use in these two cities, and that it was by pro-

ducing this conviction upon the minds of these city authorities that the defendant had secured all of the street pavement in Westport and all of the street pavement in Kansas City, under the Trinidad Lake asphalt specification for that pavement, except two short streets, aggregating about a quarter of a mile of pavement done by the Parker-Washington Co. in 1896.

The testimony further conclusively shows: that the only rival bidder for the street pavement in Kansas City and Westport, Missouri, from 1891 to the end of 1897, inclusive, that the defendant had for street pavement in these cities, was the Parker-Washington Co.

The testimony also conclusively shows: that the defendant in 1897 drove the Parker-Washington Co. out of the field of asphalt street paving in the two cities as a rival bidder under the "Trinidad Lake asphallt" specification, on the ground that the Parker-Washington Co. could not furnish the "Trinidad Lake asphalt" and that no one but the defendant could furnish asphalt from the Trinidad Lake for use in street pavement in Kansas City and Westport.

The testimony also shows: that the Parker-Washington Co. made a bid for the Main St. pavement (the first of the pavements) here in question; that its bid for this work was opposed by the defendant's agents, Hugh J. McGowan, and W. C. Scarritt before the public improvement committee of Westport; also that the bid of the Parker-Washington Co., which was lower than that of the defendant for the Main St. pavement, was rejected because the public improvement committee of Westport decided that the Parker-Washington Co. could not furnish "Trinidad Lake asphalt", and the contract in question was therefore awarded to the defendant; that the Parker-Washington Co. made no bid for the two other contracts in question which were let subsequently to the Main St. paving contract, and entirely ceased to bid against the defendant for asphalt street paving in Kansas City, Missouri, and Westport, Missouri, before the end of 1897.

These facts, and many more appear in "Section K", *ante* page 34.

It is respectfully submitted that the proximate cause of the defendant's procuring the contracts for the pavements in question were its acts of monopoly of "Trinidad Lake asphalt" in Kansas City, and Westport, Missouri, at and before the times in question, and that such acts were a violation of section 2 of the anti-monopoly act of Congress and vitiated the contracts for the pavements in question and the tax bills therefor.

IX.

The defendant did have a monopoly of "Trinidad Lake Asphalt" in Westport. No argument of the facts and circumstances stated and cited in Sections "K" and "L" is necessary to prove such monopoly. (*Ante* pages 34 to 48).

1. Why else would it be a matter of any concern to defendant's agents to procure this specification? The specification of "Trinidad Lake asphalt" could be no more fruitful to the defendant than a general specification of asphalt unless the defendant had a monopoly of "Trinidad Lake Asphalt" in Westport. The six years expense and effort put forth by defendant to procure this particular asphalt specification for street pavement in Kansas City and Westport, and defendant's procurement of all the work under this specification during that period of time, silences any denial of such monopoly at this time.

Boone v. City of Utica, 5 Misc. N. Y., 402-3.

2. Hugh J. McGowan, the agent of the defendant, aseserted and declared before a committee of the board of aldermen of Kansas City, Mo., at or about the times in question, in opposition to competitive bidding of the Parker-Washington Co. under the "Trinidad Lake asphalt" specification, that the Parker-Washington Co. could not furnish the "Trinidad Lake asphalt," and therefore could not com-

ply with the specifications; that the Parker-Washington Co could not furnish the "Trinidad Lake asphalt" for the rea son that they could not get it for use in Kansas City an vicinity unless they got it through the agent of the defend ant. (See printed record, pages 486-487). Should mor proof be required? The testimony cited in Sections "K and "L" shows conclusively that Hugh J. McGowan wa the agent and representative of the defendant in Kansa City and Westport in procuring the contracts for street pave ments, under the "Trinidad Lake asphalt" specification His declarations of the defendant's monopoly of the use o "Trinidad Lake asphalt" in Kansas City and Westpor was competent testimony on the issue as to defendant's mo nopoly, and being wholly uncontradicted and unexplained i sufficient to establish the allegation of such monopoly of de fendant.

State ex inf. v. Armour Packing Co. 173 Mo., 356

X.

The asphalt pavements were ordered and "Trinidad Lak Asphalt" was specified in the resolutions and ordinances o Westport, at the instigation and because of the lobbying an beguilement of the agents of the defendant, and not because o the exercise of any judgment of the board of aldermen o Westport upon these subjects. The tax-bills are therefor void.

The part of the record in this case, upon which th above proposition is based, is the following:

Pleading, allegations of the "6th" and "10th" charge of the original bill, quoted *ante* pages 5-6.

Proofs, stated and cited in "Section L" *ante* pages 4 to 48.

Errors, assigned by complainant to the judgment, num bered 11, 12, 13 and 14 (Pr. Rec. 27).

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In Missouri a municipal by-law is void and subject to attack for fraud of the aldermen or for fraud practiced upon them.

Morse v. City of Westport, 136 Mo., 276;
See also *Weston v. Syracuse*, 158 N. Y., 275;
San Antonio v. State, 22 Tex. Civ. App., 118;
Same case, 54 S. W. Rep., 289;
Oakland v. Carpentier, 13 Calif., 540;
Dillon Munic. Corp. (4th Ed.), Sec. 908 and Sec. 914.

As if to leave no doubt of the view of the Missouri Supreme Court on this proposition, that court recently said:

"It is true that in many jurisdictions, certainly in this state, it is true, that municipal acts, whether in form of ordinances or resolutions, may be impeached for fraud at the instigation of persons injured thereby (1 Dillon Mun. Corp. (4th Ed.) Sec. 311; *Glasgow v. St. Louis*, 107 Mo., 203). Whereas courts will not inquire into the motives of the legislature." *Barber Asphalt Paving Co. v. French*, 158 Mo., on page 547.

And this necessarily means a right to impeach such resolutions and ordinances for a fraud on the law or its requirements, *i. e.* when real wrong is not intended, as well as for fraud in fact.

Boon v. City of Utica, 5 Miscellaneous (N. Y.) 403-404;
Hersey et al v. The Board, etc., 37 Wis., 80;
Railroad and Telephone Cases v. Board of Equalizers, 85 Fed. Rep., 320;
Hill v. Swingley, 159 Mo., 45-50;
Brown v. First National Bank, 137 Ind., 667-8;
Elkhart County Lodge v. Crary, 98 Ind., 242.

For a fraud on the law is equally a subject of redress and relief.

Alexander v. Reilfe, 74 Mo., 518.

The resolutions and ordinances for the pavements in question are impeached by both legal and actual fraud:

1. The board of aldermen was authorized to initiate a street paving proceeding by resolution declaring the street pavement necessary, when, *and only* "When the board of aldermen shall deem it necessary to pave." The board was not authorized to declare necessary or order a street pavement to create work for a paving contractor. (Sec. 95). This charter provision and the general law of the land, alike, required, as indispensable to any valid resolution or ordinance for a street pavement, an exercise of judgment of the board of aldermen of the public necessity for each proposed street pavement and of the materials therefor, uncontrolled and uninfluenced by any private interest.

Burdsall v. Clark, 73 N. Y., 73;
Boon v. City of Utica, 5 Miscellaneous (N. Y.) 403-404;
Rickstrom v. City, 105 Wis., 605;
Russell v. St. Louis, 116 Mo., 248;
City of Rich Hill v. Donnan, 82 Mo. App., 386;
Brooks v. Cooper, 50 N. J. Eq., 761;
State v. City of Paterson, 34 N. J. L., 163;
Railroad and Telephone Cases v. Board of Equalizers, 85 Fed. Rep., 320;
Woodstock Iron Co. v. Extension Co., 129 U. S., 658-9.

In a recent case in the United States Court at Chicago, the action of the State Board of Equalization in assessing railway property was held null and void as a fictitious and arbitrary valuation of the property without the exercise of official judgment. In so holding, Judge Grosscup, sitting with Humphrey, district judge (See 114 Fed. Rep., on page 566) said:

"A substantial step in the taxing process is fixed by the law of Illinois; a step essential to the equal distribution of the burdens of taxation is the decision and judgment of

the State Board of Equalization. The board's place in the taxing system is that of a *quasi* judicial body. Its judgment affects, as keenly as that of any court, the property interests collectively, of the several districts of the state, and, directly and individually, of the persons and corporations owning franchises. No court can by its judgment, grasp more completely what would otherwise remain the property of the individual. In no other tribunal can there be found apter illustration of the power of the state to compel the individual to deliver up his property under the stress of law. It needs no argument to show that power, such as this, is only exercised rightly when exercised judicially. The prime quality of every judgment, without which it is no judgment, is that it is the final thought of the judge on the subject submitted, unaffected by extrinsic influences. This implies freedom of mind—not merely theoretically, but practically—the freedom of a mind that does not fear, that has no wish of its own, that sees nothing not seen through the lenses of the law. Judgments honestly made up in such atmosphere, though subject to review for error, are due process of law; judgments affected by fraud or fear, however solemnly entered, are as nothing, when weighed by the constitutional guaranties thrown around liberty and property.

"The sum of all this, as applied to the cases under consideration, is that the re-assessments complained of do not embody the real judgment of the board, in either the assessment or the equalization of the capital stock of complainants for the year 1900; and that in the absence of such real judgment, the threatened collection of taxes on the basis of the fictitious entry, would be to deprive complainants of their property without due process of law."

See also *Railroad and Telephone Cases v. Board of Equalizers*, 85 Fed. Rep., 320.

The recital in the resolutions for the pavements, that the board of aldermen deemed it necessary to pave the streets with "Trinidad Lake asphalt" was fictitious and only a *pro forma* attempt to make such a resolution as was called for by section 95 of the charter; it did not speak the real judgment of the board of aldermen which was a condition precedent to any right to adopt such a resolution. ("Section L" *ante* 42).

2. There is no charter provision requiring or authorizing a petition of resident owners of abutting lands for a street improvement. The charter requirement is that the board of aldermen shall initiate street improvements. The prerogative and only prerogative of owners of abutting land conferred upon residents is, *to prevent* a street pavement after it is proposed by the board of aldermen. No prerogative is conferred upon the property owners to act until the resolution of the board of aldermen declaring the necessity for the street pavement has been adopted and published (Sec. 95). It was a fraud on this provision of the charter for the agent of the defendant to solicit and secure a petition from the resident owners of abutting lands for the pavements, before the resolution therefor was adopted by the board of aldermen. It is illegal in a two-fold sense—*first*, it forestalled, and was doubtless intended to forestall, any protest from such residents against a pavement proposed by the board of aldermen according to such petition; *second*, it unduly influenced the board of aldermen to adopt the resolution declaring the pavements necessary and to prescribe material for the pavements favorable to defendant. What better excuse would a bribed alderman ask, with which to bewilder an abutting land owner incensed at being charged with a large assessment for an unnecessary pavement, than a citation to the petition produced for the work?

"All indirect or private methods of influencing public officials with respect to public business intrusted to them are immoral and against public policy."

Hayward v. Nordburg Mfg. Co., 85 Fed. Rep., 4;
Same case, with valuable note, 29 U. S. Ct. Ct. App., 446.
See also *Brooks v. Cooper*, 50 N. J. Eq., 761-771;
Elkhart County Lodge v. Crary, 98 Ind., 238.

3. Had the abdication of municipal judgment to the agents of the defendant, of the necessity of the street pavements and of the materials therefor, (the real reasons for the

adoption of the resolutions), been recited in such resolutions, they would be pronounced unauthorized and void, as have all such.

Cooley Const. Lim. (6th Ed.), 248-249;
Ewall's Evans on Agency, side pages, 41-42;
Mecham, Public Officers, Sec. 567;
Schumway v. Bennett, 29 Mich., 451, 464;
Ruggles v. Collier, 43 Mo., 353;
City of Rich Hill v. Donnan, 82 Mo. App., 386;
Neil v. Gates, 152 Mo., 594;
Russell v. St. Louis, 116 Mo., 248.

A state legislative provision would be void which expressly authorized the board of aldermen to thus abdicate to a paving contractor their judgment of what streets should be paved, when they should be paved, and how they should be paved, at the cost of abutting lands.

Cooley Const. Lim. (6th Ed.), 125, note 3; also 606-607;
Kean v. Driggs Drainage Co., 45 N. J., 91-95;
Matter of Tuthill, 163 N. Y., 133-138;
Woodward v. Central Vermont Ry. Co., 180 Mass., 599;
Powers v. Bergen, 2 Selden (N. Y.), 366-367;
Schumway v. Bennett, 29 Mich, 451, 464.

4. Surely, a board of aldermen cannot, by merely suppressing and keeping from the record of its proceedings, or by falsely reciting the facts and circumstances on which it acts, thus sustain in a false way corporate action not authorized by the city charter, or which, as done, could not have been authorized by the legislature.

Cooley Const. Lim. (6th Ed.), 125, note 3;
White v. City of Tacoma, 109 Fed., 32;
Railroad & Telephone Cases v. Board of Equalizers, 85 Fed. Rep,, 320;
Smith v. Lowe, 121 Fed., 753;
Knoppi v. Roofing & Paving Co., 92 Mo. App., 282;
City of Sedalia, Mo. v. Scott, 78 S. W. Rep ; 276. 279.
State ex rel Fennell v. Aldridge, 66 Ohio St. 599, 604.

Stockton, Atty Gen'l. v. Central RR. Co. 50 N.J. Eq. 52-

As aptly said, "There can be no greater power of the board to act of its own motion than by virtue of positive law."

Adams v. Brennan, 177 Ill., 201;
See also *Commonwealth v. Cambridge*, 7 Mass., 165-167;
Commonwealth v. Swin, 2 Pick., 547.

The board of aldermen were *pro hac vice* agents of the owners of abutting lands charged with the cost of the street pavements. Not merely the agents of such owners as were residents, but of all of the abutting owners.

Boon v. City of Utica, 5 Miscellaneous (N. Y.) 403-4.
McQuiddy v. Brannock, 70 Mo. App., 543;
Mayer, etc. v. Reynolds, 20 Md., 1.

Such agency being *in invitum*, the acts of the board of aldermen in the interest of the paving contractor ought to be the more subject to judicial scrutiny and defeat than if they were acts of a self-created agency of the individuals interested.

As agents, it was the duty of the board of aldermen to disclose and not conceal all or any of its illegal or unauthorized action in adopting resolutions and ordinances, or in making contracts for the pavements. The suppression from the face of these proceedings the fact that such resolutions and ordinances were adopted because of the petition of resident owners of abutting lands, procured and presented by the agent of the defendant, and because of the lobbying and undue influence of the agents of the defendant was *per se* a fraud of the board of aldermen upon the public, and particularly upon the owners of the abutting lands who had not signed any such petition and who had no knowledge of these things.

Emigrant Co. v. County of Wright, 97 U. S., 339;
McMullen v. Hoffman, 174 U. S., 639.

As agents, of the owners of lands abutting on the pavements, the board of aldermen were not authorized to declare necessary and order pavements of materials in the interest of the defendant, the adverse party.

Louis v. Slack, 27 Mo. App., 119;
Es. Ins. Co. v. Ac. Ins. Co., 138 N. Y., 449;
Harrison et al v. McHenry, 9 Ga., 168-169.

It is a fraud for an adverse party to beguile an agent with whom he is dealing, into favoring him rather than the principal for whom the agent is acting, and likewise a fraud for an agent to conspire or collude with a third party against his principal.

Hickman v. Green, 123 Mo., 176;
National Ins. Co. v. Minch, 53 N. Y., 144;
Musser v. Hyde, 2 Watts & S. (Pa.) 314;
Cooper v. Ford, 69 S. W. Rep., 487;
Woodstock Ins. Co. v. Extension Co., 129 U. S., 643.
Ottle v Bank, 75 Mo 103-4

5. *Lobbying by the defendant's agent with the board of aldermen for the resolutions, ordinances and contracts for the pavements, was essentially a fraud and one which vitiated the proceedings.*

"To legalize the traffic of such service would open a door at which fraud and falsehood would not fail to enter." *Trist v. Child*, 21 Wall., 451-2.

An equal privilege at bidding for public work *already ordered*, is the only right or privilege that properly may be said to belong to a contractor. It is certainly no right or legitimate privilege of a contractor, in person or by agent, to persuade public officials by private solicitation or by employing other private methods, that a new court house or a new city hall is needed, or that a particular street needs to be paved or repaved, with a view to getting the contract for the work, for obviously these, and the like public improvements are authorized only, upon the unbeguiled and unbiased official judgment, that they are needed for the public convenience.

The right of the public and the owners of the lands abutting upon a street, to the independent judgment of the board of aldermen, both as to the necessity and materials for a street improvement, is utterly inconsistent with any right or liberty of a paving contractor to employ agents to lobby with a board of aldermen to declare necessary or to order a street pavement with the material of a particular place, or at all. It is the duty of the municipality to declare necessary and improve only such streets as are necessary for the public convenience, and to make such improvements in a reasonable manner, but by the lobbying of an interested party, or his agents the municipal body may be persuaded and influenced to order and contract for needless and extravagant improvements, and to trespass upon individual rights. The tendency of lobbying is at least in that direction. It is for these reasons that this court, and all courts hold, that contracts which call for or contemplate lobbying service, are corrupt in their tendency and are contrary to public policy, and are therefore void, and that, too, "without reference to the question whether improper means are contemplated or used in their execution."

Twist v. Child, 21 Wall, 441;
McMullen v. Hoffman, 174 U. S., 648;
(A like agent). *Critchfield v. Bermudez Paving Co.*, 174 Ill., 466;
Mecham on Agency, Sec. 25. (A good collation of the authorities),
Brooks v. Cooper, 50 N. J. Eq., 772;
Veazey v. Allen, 173 N. Y., 359.

These authorities (and they are leading cases on the subject) hold that Hugh McGowan could not recover of the defendant any compensation for his services in procuring the paving contracts, because the contract to procure a contract from a city necessarily implies that lobbying with the municipal body is authorized and expected to be employed in the procurement of the contracts for public work. It

would seem to be law of only a most peculiar type which would deny Hugh McGowan any right of recovery for his services in procuring paving contracts for the defendant on the ground that such contemplated service was corrupt in its tendency and contrary to public policy, and yet hold contracts valid against innocent third parties, procured for the defendant by such illegal service. Such a confused and illogical state of the law is impossible. There can be but one logical and safe conclusion on this proposition, and that is the following: As Hugh McGowan's contract with the defendant for procuring the contracts for the pavements was tainted with illegality and unenforcible by him against the defendant because of the bare contemplation of lobbying, the paving contracts, which are the product of his lobbying, are likewise necessarily tainted and destroyed by the real thing. Defendant could not if it would, divorce its paving contracts from the lobbying and scheming of Hugh J. McGowan, or his assistants, by which such contracts were procured for the defendant. Defendant would not be permitted to say that it did not authorize the lobbying to procure such contracts.

Connecticut Mutual Life Ins. Co. v. Hillman, 188 U. S., 219, and cases cited;
State ex inf. v. Firemen's Fund Ins. Co., 152 Mo., 3-38;
Myerhoff v. Daniels, 173 Pa. St., 559;
Leonard v. Poole, 114 N. Y., 371.

"Irregularities on the part of an agent, employe, relative or intimate friend, will be imputed to the principal."

Finlen v. Heinze, 73 Pac. Rep., 130;
See also preceding authorities.

In *Finlen v. Heinze*, *supra*, the judgment of the trial court was reversed by the Montana Supreme Court for the lobbying of a female, a supposed agent of the winning party, with the trial judge. Besides, the contract between McGowan and the defendant—which necessarily implied that McGowan was to do lobbying to procure the paving con-

tracts—the length of time this method of procuring contracts for the defendant was followed by McGowan and his assistants in Kansas City and Westport, conclusively proves that such method was authorized by the defendant.

Sharp v. Knox, 48 Mo. App., 169;
Reynolds v. Collins, 78 Ala., 94.

Who questions that these three parallel pavements, only a block apart and each a mile long, in an outlying and largely unimproved district, would not have been ordered and contracted for with the defendant all within four month's time (*Ante*, 48-51) but for the alleged and proven arts and wiles practiced upon the board of aldermen by defendant's agents as lobbyists? (*Ante*, 42 to 48).

The board of aldermen of Westport never by resolution declared an asphalt street pavement necessary, except upon petition of resident owners of abutting lands, procured and presented by Hugh J. McGowan or his assistants; the board of aldermen always, by resolution, declared it necessary to pave a street with "Trinidad Lake asphalt" whenever Hugh J. McGowan or his assistants, procured and presented such petition, and always followed such resolution with a like ordinance ordering the work and with a like contract with the defendant therefor; Hugh J. McGowan or his assistants attended the meetings of the board of aldermen and spoke to the aldermen singly on the subject of the resolutions and ordinances, and treated them in the saloons in Westport before the sessions of the board, at the times when the matter of adopting the paving resolutions or ordinances aforesaid or the award of the contracts for the sixteen asphalt pavements laid by the defendant in the city of Westport, (including the times when the resolutions, and ordinances and contracts for the three pavements in question) were pending and were acted upon by the board of aldermen (*Ante*, 44 to 47).

"Who finds the heifer dead and bleeding fresh,
And sees fast by a butcher with an ax,
But will suspect 'twas he that made the slaughter."
—Part Second, Henry VI., Act III, Scene II.

This course of procedure implies even more than has yet been stated. It is as if the board of aldermen had said to the owners of the lands on every street in the city that no street would be paved, or ordered paved at all, until they arranged with the defendant's agent therefor. Imagine if, it can be imagined, the aldermen of two cities for six years, thus subservient to the scheme of monopolizing asphalt street pavement for defendant, a foreign corporation, all for nothing.

It is, however, not necessary to the invalidity of the resolutions, ordinances and contracts for the pavements to show, that they were wholly due to the lobbying and undue influence of the defendant's agent. The defendant's agent had no lawful right to stimulate or influence the action of the board of aldermen at all and defendant could not, if it would, make it a mere question of how much the lobbying of its agents stimulated or influenced the board of aldermen in declaring necessary, ordering and contracting for the pavements to save these municipal proceedings from illegality. It is not necessary that the court should enter into any calculation to ascertain the exact degree or extent these paving proceedings were due to defendant's lobbying. The fact that these municipal proceedings are chargeable at all with lobbying of defendant's agent, vitiates them altogether. "Where parties have woven a web of fraud or wrong it is said to be no part of the duty of courts of justice to unravel the thread." Byles on Bills, page 146.

See also *Henrioid v. Neusbaumer*, 69 Mo., 97;
Elkhart Co. Lodge v. Crary, 98 Ind., 238;
Trist v. Child, 21 Wallace, 452;
Finlen v. Heinze, *supra*.

Complainant Injured. 1. It is to be assumed that McGowan, who hired three assistants, maintained a separate office, and his controlling prestige with the muncipal bodies of Kansas City and Westport was adequately paid for procuring the paving contracts for the defendant. This ex-

pense to the defendant was doubtless added to the cost of the pavements, and charged against the abutting lands.

2. The complainant is further injured: His lands have been charged and beclouded with the cost of unneeded pavements, which would not have been ordered but for the lobbying of defendant's agents.

Point III, also point VII should be read, and considered along with this point, to bring out a full view of the law and facts on this proposition.

XI.

The asphalt pavement laid by defendant in 1897 on Wyandotte street, and on the part of Main street from 39th street to Westport avenue, was unreasonable and unauthorized because the macadam pavement then upon Wyandotte street or upon this part of Main street, previously laid by Westport and charged to the abutting lands, was then a good and substantial pavement and in no need of repair or replacement by another pavement for safe and convenient travel thereon. Hence, the tax-bills therefor against complainant's abutting lots are void.*

The parts of the record on which this ~~count~~ point is based, are the following:

Pleading, "Sixth charge" of the bill, *ante* page 5.

Proofs, stated and cited in "Section M" *ante* page 48.

Error, No. 10 of complainant's assignment of errors (Pr. Rec. 26).

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* *Such of this point as refers to Wyandotte street, relates to defendant's appeal, as the Wyandotte street tax-bills were declared void by the trial court (Pr. Rec. 24). For convenience it is embodied herein with the part of the Main street pavement questioned in error No. 10, assigned by complainant to the judgment.*

The part of Wyandotte street in question in defendant's appeal, was macadamized in 1893, by Westport and tax-bills therefor were issued against abutting lands, including those of complainant; this macadam pavement was in good condition and practically unworn in 1897, when the asphalt pavement in question was laid; the testimony is clear that no repair or replacement of the street was then needed for safe and convenient travel thereon. The same is true as to the south block of the Main street pavement in question, in complainant's appeal, to-wit: from 39th street to Westport avenue on which complainant's lots 1 to 5, block 45, front. See the positive and undisputed testimony to this effect, given by the following witnesses:

R. H. Field, Pr. Rec. pages 197-198, 345;
George L. Love, Id. pages 72, 84, 347-348-349, 386-387;

The court will observe, that none of the testimony above cited on this issue, except that on pages 386 and 387, was taken after any amendment to the bill.

J. C. Tate, Id. page 93;
A. D. Beedle, Id. (defendant's witness) page 284.

The resolutions, ordinances and tax-bills for the pavements in question on Wyandotte street and as to that block of Main street between 39th street and Westport avenue were therefore unreasonable, unauthorized and void.

See in point:
McFarland v. Chicago, 185 Ill., 242-252;
Hawes v. Chicago, 158 Ill., 653;
Same case, 57 N. E. Rep., 12;
Corrigan v. Gage, 68 Mo., 541:
Halpin v. Campbell, 71 Id., 493;
Cooley Const. Lim. (6th Ed.) 125, Note 3.

The principle on which such resolutions are held unauthorized and void is this: That all general grants of legislative authority are restricted with an implied limitation,

that such authority shall be exercised only in a reasonable manner, and that the exercise of such authority in any unreasonable or oppressive manner, is essentially *ultra vires.* It is on this principle that complainant stands in this point.

In *Wilkinson v. Leland* (2 Peters, 657), this court by Judge Story, said:

"The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice, in this country, would be warranted in assuming that the power to violate them (a power so repugnant to the common principles of justice and civil liberty) lurked under any general grant of legislative authority or ought to be implied from any general expression of the will of the people."

See also *Smith v. Ames*, 169 U. S., 466;
Smith v. Lowe, 121 Fed. Rep., on page 759;
State ex rel v. Lafayette Co., 41 Mo., 226.

The federal courts of equity can and will set aside all unreasonable, arbitrary and illegal acts and charges made under color of state authority.

Smith v. Lowe, 121 Fed. Rep., 753;
Smith v. Ames, 169 U. S., 466;
Reagan v. The Trust Co., 154 Id., 397-399;
Fallbrook Irrig. Dist. v. Bradley, 164 U. S., 159-160;
White v. City, 109 Fed. Rep., 32.

The necessity required by the Westport charter to authorize the board of aldermen to improve a street is a *public necessity.* The Missouri legislative act must be thus construed to save it from conflict with the constitution.

Morrison v. Morey, 146 Mo., 562;
In the matter of Tuthill, 163 N. Y., 133-138;
Mo. Pac. Ry. Co. v. Neb., 164 U. S., 403;
Fallbrook Irrig. Dist. v. Bradley, 164 U. S., 158-166;
Stratton Claimants v. Morris Claimants, 89 Tenn., 501-535.

With such constitutional protection it must follow that an abutting land owner charged with the cost of a repavement has the right to prove that there was no color of public necessity for such repavement.

Fall. Irrig. Dist. v. Bradley, 164 U. S., 159-160.

Complainant does not claim that if it were a question of whether a pavement should be repaired or replaced with another pavement, that he would have any right to question the discretion of the municipal authorities as to which should be done, viz: a repair or repavement, but his claim is this: when the Westport authorities had, in the years 1892 and 1893, paved respectively, Wyandotte street and the part of Main street, the south block of the pavement in question, with a macadam pavement, and assessed the whole cost thereof to the abutting lands, including his lands, no jurisdiction or municipal authority could or did attach which would warrant a repavement of these streets at the cost of the abutting lands, when this macadam pavement was not worn or displaced in any way to give color to a claim that the safe or convenient use of the highway fairly called for a repairing or replacement of the pavement thereon. Any less security than this would leave the owners of abutting lands without protection against the caprice and oppression of municipal authority. "The great purpose of the requirement (due process of law) is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." *Dent v. West Virginia*, 129 U. S., 124.

Complainant submits that the public necessity for a street pavement cannot be forestalled nor foreclosed against the owner of private property taxed for a street pavement,

beyond question, by any fiction or presumption of law, nor even by the fiat of the state legislature itself.

In Re Jacobs, 98 N. Y., 111-112;
Smith v. Lowe, 121 Fed. Rep., 753;
Fallbrook Irrig. Dist. v. Bradley, 164 U. S., 159-160;
Cooley Const. Lim. (6th Ed.) 606-607;
White v. City, 109 Fed. Rep., 32;
Vick Wo v. Hopkins, 118 U. S., 369;
Ragan v. Farmers Loan & Trust Co., 154 U. S., 399;
Cummings v. State of Mo., 4th Wallace, 325.

As appropriately remarked of the judicial prerogative, by Mr. Justice Holmes for the Supreme Court of Massachusetts, "We cannot invent fictions to save legislative acts."

Woodward v. Central Vermont Ry. Co., 180 Mass., 604;

Erroneous claims of fact by defendant on this point.

Judging from its "First" assignment of errors defendant may claim the complainant's bill does not allege that the pavements were unnecessary; such claim cannot be sustained. After describing the three pavements in question laid by defendant, the municipal resolutions, ordinances and contracts therefor, the "Sixth" charge of the bill contains the following allegation: "And the order for the work aforesaid, upon each of the three streets aforesaid, *was in each case not due to any necessity therefor.*" (*ante.* 5.)

Defendant filed no exception to the sufficiency of this allegation, but in its answer met it expressly as follows: "Defendant denies that the order for the work aforesaid upon each of the three streets aforesaid was in each case, or in any case, not due to any necessity therefor." (Pr. Rec. 11).

The *relevancy* of the testimony offered on this subject was not once objected to by the defendant.

"An imperfect averment, if it is to be the subject of exceptions, must, in the main, be brought to the notice of the court by a demurrer. It is but seldom, and only when the

statement is so vague and loose as to be utterly inert and inefficient, that it can be objected to at the final hearing." Beach's Modern Equity Practice, Sec. 108, and note.

See also *Tufts v. Tufts*, 123 U. S. 76;

Savings & Loan Soc. v. Davidson, 97 Fed. Rep., 703 and cases cited;

Nashua Savings Bank v. Anglo American Co., 189 U. S., 231.

Banking House of Nelson v. Darr, 139 Mo. 675

Complainant denies the statements in defendant's assignment of errors of matter *dehors* the record in this case, and to make such denial most specific complainant says: (1) It is not true that the issue as to the unnecessary repavement with asphalt in 1897, on Wyandotte street was not one tried and submitted to the court. (2) It is not true that the receiver in *Mastin v. Mastin*, (a different case) in the U. S. Circuit Court, at Kansas City, signed the petition for the work under any order of that court. (3) The statement that the United States Circuit Court at Kansas City, expressed any favorable judgment, or any judgment, or made any mention whatever of the Wyandotte street improvement is wholly untrue. (4) Neither is it true "that no property owner along the entire street protested, or attempted to protest against the improvement on Wyandotte street." (There was a minority protest of the residents.) (Pr. Rec. 168). (5) Nor is it true that any adequate allowance was made in the price of the asphalt pavement for the value of the macadam then in place. (The contract price for the Wyandotte St. pavement on the macadam was $2.00 per square yard; the contract price for the Baltimore avenue pavements was $2.10, per square yard, which included the cost of a 4 inch base of hydraulic concrete, thus showing that only 10c a square yard, gross, was allowed for the macadam, including the cost of resurfacing it, used as a base for the asphalt pavement.

The issues which complainant makes as to the other matters in defendant's assignment of error, will be made sub-

jects of separate and distinct points hereinafter. It is, however, now and finally submitted that there is no merit in defendant's appeal on the issue of the necessity for the Wyandotte street pavement, also that the testimony and the law equally required a decree for complainant on the same ground cancelling the tax-bills against lots 1 to 5, block 45 for the Main Street pavement for the reasons given in this point, which the trial court refused to complainant.

XIII.

The question of benefit of the pavements to complainant's property cuts no figure in this case.

Most of the testimony produced by the defendant was upon the issue tendered in the answer that the amount of benefit of the pavements to complainant's property was greater than the amount charged thereto for the pavements.

To this defense or counter-claim complainant replies:

First. The complainant does not reside and has no improvements on any of the lands fronting on the pavements. Complainant submits for the serious consideration of this court whether the testimony on this issue, properly viewed and weighed, shows the pavements to be of any real benefit to the complainant. The testimony of the witnesses on this issue, **given on complainant's re-examination and cross-examination,** shows sufficiently, without any comment, his cause for sorrow and regret that the pavements were ever laid. All of the testimony on this issue will be found abstracted in "Section N" of the topical statement of this case. (*Ante* pages 51 to 62.)

Now nearly seven years old, two years beyond the time they were guaranteed, of what value will the court assume the pavements are at this day to complainant's vacant property?

Second. The question of benefit to complainant's property is, however, a wholly immaterial issue. If the municipal paving proceedings were authorized the tax-bills would be valid, although the pavement was not one cent of benefit to the property charged.

McQuiddy v. Smith, 67 Mo. App., 205;
Moberly v. Hagan, 131 Mo., 19;
French v. Barber Asphalt Paving Co., 158 Mo., 556;
Same case, 181 U. S., 335; (Quotation from *Mattingly v. District of Columbia*).

Third. No promise of complainant to pay for the unauthorized pavements can be implied because of any supposed or even real benefit of the pavements to complainant's property.

See same proposition and authorities, *Ante*, 78.

Fourth. **Defendant has and can have no equity against the complainant in this case for the expense of laying the pavements, because of the frauds aforesaid, committed by the agents in the procurement of the contracts for the pavements**

"The law cares very little what a fraudulent party's loss may be, *and exacts nothing for his sake*. It will not undertake to indemnify him for the expenditures made in the prosecution of his fraudulent purpose."

Guckenheimer v. Angevine, 81 N. Y., 394.

"A court of equity must decline to assist him (in the language of Mr. Justice Story; 2 Story's Eq., 8) to escape from the toils which he has studiously prepared to entangle others."

Galloway v. Finley, 12 Peters, 297.

"The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who,

by deceit or unfair means, has gained an advantage. To aid a party in such a case would make this court the abettor." *Bein v. Heath*, 6 How., 247.

See also *Woodenware Co. v. United States*, 106 U. S., 432;
Henrioid v. Neusbaumer, 69 Mo., 97.

This doctrine is as applicable to an equity asserted by a defendant as much as if it were asserted by a complainant.

Bean v. Lake Superior Iron Co., 134 U. S., 531.

XIV.

There is no legal or equitable ground for any claim in this case that the complainant has been guilty of laches or that he is estopped to attack the special tax-bills in question. *

Pleadings and proofs (in full) on this issue are printed in "Section O," *Ante*, pages62-63.

This point is confidently submitted on what has been said and cited on these subjects as parts of Point I of this brief (*Ante*, pages 77 to 80).

* *The fraud on private right and official action, the frauds on the law and on the federal constitution itself, hereinbefore pointed out, can not find safe refuge in the law of estoppel or laches, enforced in courts of equity.*

XV.

This is a proper suit for the relief prayed.

The statute says the tax-bills in question shall be *prima facie* a lien on the lands.

Laws Missouri, 1895, page 85, Sec. 92 and Sec. 90 (quoted *ante* p. 24).

Hence, and as the special tax-bills are void for the facts *aliunde* aforesaid, this suit is a proper action to cancel and remove the said tax-bills as a cloud on complainant's title to the lands therein charged.

Rich v. Braxton, 158 U. S., 379;
Lyon v. Alley, 130 Id., 178;
Ogden City v. Armstrong, 168 U. S., 224, 240-1;
K. C.. Ft. Scott & Memphis Ry. Co. v. King, 120 Fed. Rep., 614;
Ormsby v. Ottman, 85 Fed. Rep., 492;
Perkins v. Baer, 95 Mo. App 70.
Hays v. Dowis, 75 Mo., 250;
State ex rel Baha v. Phillips, 97 Mo., 331.

A bill in equity will also lie to avoid a multiplicity of suits over the same matter: (There are 17 special tax-bills against as many different lots of land, involved in this case and there could be that number of suits on said tax-bills. Westport Charter, Sec. 88 and Sec. 92, *ante* pages 23-24).

Ogden City v. Armstrong, 168 U. S., 224;
Marshall v. Holmes, 141 U. S., 589;
Smith v. Ames, 169 U. S., 517.

Also to annul or restrain proceedings under an unconstitutional law.

Wilson v. Lambert, 168 U. S., 611;
Village of Norwood v. Baker, 172 U. S., 270;
Smith v. Ames, 169 Id., 466;
Pollock v. Farmers Loan and Tr. Co., 157 U. S., 429;
Deitz v. City, 91 Wis., 422.

Also to prevent the enforcement of statutory liens created in violation of the constitution.

R. R. and Telephone cases v. Board of Equalizers, 85 Fed., 302;

Nashville etc., R. R. v. Taylor, 86 Fed. Rep., 169-188.

It is too late for defendant to claim that complainant has any adequate remedy at law or other remedy.

Williams v. Monroe, 101 Fed., 323;

Book v. Justice Mining Co., 58 Id., 832.

A remedy in state court, provided by state statute, is no bar to equity jurisdiction in federal court, when there is diverse citizenship, or alleged violation of the federal constition.

Smith v. Reeves, 178 U. S., 444;

National Surety Co. v. State Bank, 120 Fed. Rep., 593.

XVI.

The United States Circuit Court had jurisdiction.

Diverse citizenship. The bill alleges that complainant is a citizen of Missouri and resides in Kansas City, and that the defendant is a private corporation of West Virginia (*ante* 2). The answer admits this allegation (Pr. Rec. 7-8). This diverse citizenship gave complainant a right to sue defendant in the district of the United States Circuit Court where complainant resides.

McCormack v. Walthers, 134 U. S., 341;

Barnes v. Western Union Telegraph Co., 120 Fed., 550;

Fairbanks & Co. v. Ry. Co., 54 Fed. Rep., 420;

Desty New Federal Procedure, Sec. 87.

Violation of federal constitution alleged. The bill alleges: That the city charter of Westport, under which the tax-bills complained of were issued to defendant, violated

section 1 of article XIV (*ante* pages 3-4); and that the resolutions and ordinances for the pavements in question violated section 8 of article I, of the federal constitution (*ante* page 6).

These allegations made a case for the exercise of the jurisdiction of the circuit court of the United States.

Scott v. Donald, 165 U. S., 58;
Smith v. Ames, 169 U. S., 466;
Wilson v. Lambert, 168 U. S., 611;
Walla Walla City v. Water Co., 172 U. S., 1;
Cummings v. Chicago, 188 U. S., 410;
Union & Planters Bank v. City of Memphis, 111 Fed. Rep., 561.

Amount in dispute more than $3,000.00 exclusive of interest and costs.

The seventeen special tax-bills for the three pavements held by defendant, and attacked herein, aggregate $3,376.45 (see *ante* 16). The aggregate of the principal sums of these special tax-bills exceeding $2,000.00, made a sufficient amount in dispute to authorize this suit in the United States Circuit Court, *though no one of said tax-bills amounted to that sum.*

Marshall v. Holmes, 141 U. S., 589;
Fetchette v. Blows, 74 Fed. Rep., 47;
Freeman Stribling Shoe Co. v. Roper, 94 Id., 739;
O'Connell v. Reed, 56 Id., 531;
Pacific Live Stock Co. v. Hanley, 98 Id., 327;

The issue on the amount involved. The particular issue upon the amount involved in this case is a denial in defendant's answer of complainant's title, to the eight lots, in block 45, of the seventeen lots of land, against which the special tax-bills, aggregating $3,376.45, were issued.

Complainant's title to the seventeen lots of land. The answer admits the allegations of the bill that complainant owns, and owned at the times in question, the following de-

scribed lots and parts of land in Hyde Park, Westport, Missouri, to-wit: lots 1, 2, 7, and 8, block 39; lots 3 and 4, block 41; lot 1, block 49; the south 15 17-100 ft. of lots 1 and 2 in block 50; but the allegations of the bill that complainant owns and owned at the times in question an undivided ½ of lots 1, 2, 3, 4, 5, 8, 9 and 10 in block 45 is denied by defendant's answer.

(See allegations of the bill of complainant's lands, Pr. Rec., 1.

See admission and denial of complainant's title in defendant's answer, as above stated, Pr. Rec., 8).

The defendant's answer thereupon sets out the amount of the special tax-bills against the lots of land in severalty and in gross and shows what appears in the petition, viz: that $1,583.23 is the amount of the special tax bills against the 8 lots in block 45. To this extent and in this manner only was the jurisdiction of the United States Circuit Court put in issue by the defendant, to-wit, by denial that complainant owned an undivided ½ of the 8 lots in block 45, or any other interest therein.

Complainant showed that he owned an undivided ½ of the lots in block 45, the interest alleged in the bill, and was in actual possession thereof, by undisputed and unquestioned testimony. **See "Section C"** *ante* **17.**

Nature of his title to the lots in block 45.

Though the deed was made to Annie Camp Field, the legal title to the undivided half of the lots in block 45, having been bought and paid for by complainant for his own use, was *ipso facto* in complainant *by the statute of uses.*

In point *Fellows v. Ripley et al.* 69 N. H. 410; *s. c.* 45 Atlantic Rep. 138.

The Missouri Statute of uses, reads as follows: (R. S. 1899, Sec. 4589.)

"Where any person or persons stand or be seized, or at any time hereafter shall stand or be seized, or and in any lands, tenements or hereditaments, to the use, confidence or

trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, covenant, contract, agreement, will or otherwise, by any manner of means whatsoever, in every such case all and every such person or persons, and bodies politic that have, or hereafter shall have, any such use, confidence or trust, in fee simple for term of life or of years, or otherwise or any use, confidence or trust, in remainder or reversion, shall from thenceforth stand and be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same lands, tenements and hereditaments, with their appurtenances, to all intents, constructions and purposes in law, of and in such like estates, as they had or shall have in use, confidence or trust of or in the same; and that the estate, right, title and possession that was or shall be in such person or persons, that were or hereafter shall be seized of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politic, be found henceforth clearly deemed and adjudged to be in him, her or them, that have or hereafter shall have such use, confidence or trust, after such quality, manner, form or condition as they had before in or to the use, confidence or trust that was or shall be in them." (See first declaration of trust Pr. Rec. page 201).

No particular form required to declare a trust.

It does not have to be acknowledged before an officer.

It is even held sufficient if it be informally stated in an ordinary letter to the beneficiary or to any other person.

Perry on Trusts, sections 81 and 82.

Tiedeman on Real Property (Enlarged Edition) Sec. 506.

Resulting trust may be proved by parol testimony alone.

When the purchase money of land is paid by husband and title put in wife's name with the understanding that she

was to hold it for the husband, the beneficial title is in the husband *and this may be shown entirely by parol evidence.*

Teideman on Real Property Sec. 507;
Smithsonian Institute v. Meech, 169 U. S. 399;
Siebold v. Chrisman, 7 Mo. App., 254;
Same case, affirmed, 75 Mo., 308.

The writing aforesaid of the wife of complainant, if ineffective as a declaration of the trust, is certainly competent as evidence of a resulting trust in complainant.

Siebold v. Chrisman, 7 Mo. App., 256;
See also the 2nd declaration of trust. (Pr. Rec. 203.)

The question of complainant's title to a part of the lands in question being only an equitable title, does not make a question of jurisdiction of the circuit court in this case.

This proposition is *dehors* the pleadings and assignment of errors, and is here noticed only because the trial judge's opinion shows *it was the point of non-jurisdiction* of the court, made by defendant (Pr. Rec., 516-517). This question goes only to the right of complainant to sue and does not go to the jurisdiction of the circuit court, *raised in the defendant's answer and assignment of errors.*

Blythe v. Hinckley, 173 U. S., 501;
Huntington v. Laidley, 176 U. S., 668;
Illinois Central Ry. Co. v. Adams, 180 U. S., 28-35.
Louisville Trust Co v Knott 24 Sup Ct Rep 119

Defendant cannot avail himself of any objection to complainant's maintaining this suit because of the character of complainant's title to the lots in block 45, because the particular facts on which the objection is based are not raised by plea.

Stock Yards Co. v. L. & N. R. R. Co., 67 Fed. Rep., 35-40;
Beach's Modern Eq., Sec. 330, note 3.

However, and whatever the nature of the point may be, it must fail because such matter must be raised by plea

or demurrer and cannot be raised in the answer, even if set up with precision. The Supreme Court of the United States ruled and said, in *Livington's Executrix v. Storey*, 11 Peters, 352-393:

"It now only remains for us to dispose of the defendant's protests, *in the beginning of his answer, against the jurisdiction of the court in this case.* The twenty-third rule of this court for the regulation of equity practice in the circuit courts has been relied on to show that it is competent for the defendent, instead of filing a formal demurrer or plea, to insist on any special matter in his answer; and have the same benefit thereof as if he had pleaded the same matter, or had demurred to the bill. This rule is understood by us to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction, and especially to those founded on any personal disability, or personal character of the party suing, or to any pleas merely in abatement. In this respect it is merely affirmative of the general rule of the court of chancery; in which matters in abatement and to the jurisdiction, being preliminary in their nature, *must be taken advantage of by plea, and cannot be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue.* 1 Summer's Rep., 506 *v.* Mann."

See also *Stock Yards Co. v. L. & N. R. R. Co.*, 67 Fed. Rep., 40;
Beach's Modern Eq., Pr. Sec. 293 and Sec. 299.

Defendant has waived and cannot restore any issue or objection to complainant's title to the lots in block 45.

Not a question was asked by the defendant on the issue tendered in the answer as to complainant's title and interest in the lots in block 45, but after the complainant's unquestioned testimony on this issue, the defendant took over 200

pages of depositions on other issues in the case, which are in the transcript filed in this case (See index to testimony taken by defendant in the printed record filed herein).

Moreover, the solicitor for the defendant, in eliciting proof from defendant's witnesses in the said depositions taken and filed in this case by defendant, propounded questions which in form assumed and conceded that complainant owned all of the tracts of land described in the bill, including the lots in block 45, and in some of these questions by name conceded complainant's title to the lots in block 45. (See "Section D," *Ante*, 19-20).

It is respectfully submitted that this conduct and course of procedure by the solicitor for the defendant was a waiver and abandonment of the issue made in his answer on the complainant's title to the lots in block 45, and that such issue cannot be revived by the defendant.

Walker v. Owen, 79 Mo., 563;

California Electrical Works v. Frick, 47 Fed. Rep., 583;

North Chicago Street Ry, Co. v. Burnham, 102 Fed. Rep., 669.

The finding and decree adjudged that the complainant owns all of the lots of land alleged and described in his bill. No error was assigned by defendant to this part of the finding and decree. The defendant was willing enough to let the judgment and decree stand adjudicating the validity of the special tax-bills against the eight lots in block 45. The issue as to complainant's title to the eight lots in block 45 should stand as adjudicated by the decree, and as though no appeal was taken, because no error in such adjudication has been assigned, and because, as above claimed, the defendant waived and cannot restore the issue on the complainant's title to the lots in block 45.

XVII.

Complainant's right to bring and prosecute this suit is not at all impaired or affected by the fact that his interest in the eight lots in block 45 may be deemed only an equitable title, or be less than the whole title.

(1) The cases which may be cited by the defendant enforcing the chancery rule, requiring the complainant to have the legal title and actual possession of lands to authorize a suit to quiet title were in suits between conflicting claimants of the *title* to the land, and in states where they had no such statute as in Missouri. Not one of them was a suit to cancel the cloud of only an apparent lien. Not one of the reasons given for requiring the legal title and actual possession of the property to authorize a suit to quiet title or to remove the cloud of a conflicting claim of title, fairly applies to an attack on a special tax-bill. It is clear that the ancient chancery rule, invoked by defendant, is only a general rule and always had its exceptions, and that the rule or the reason thereof never did apply to such a case as this.

Beadle v. Mead, 81 Mo., 297, l. c., page 303;
Ins Co. v. Smith, 117 Mo., 262;
Jones v. Smith, 22 Mich., 365; (paragraph II);
Danhl v. Rumheim, 132 U. S., 262;
Smith v. Orton, 21 How. U. S., 241;
Louisville Tr. Co. v. Stone, 107 Fed. Rep., 305;
Shofield v. Ute Coal Co., 92 Fed. Rep., 269;
Reiner v. McKay, 35 Id., 86;
Allen v. Holliday, 25 Id., 638;
Elk Fork Oil Co. v. Jennings, 84 Id., 838;
Shaw v. Dwight, 27 N. Y., 244;
Miller v. Cook, 135 Ill., 190, 26 N. E. Rep., 750;
Beck Lumber Co. v. Rup, 188 Ill., 562, *s. c.* 59, N. E. Rep., 429.

(2) Since the Missouri act of 1897, (now Section 650, Revised Statutes of 1899), it can never be held necessary that a complainant suing to remove a cloud on the title to his land shall be in actual possession of such lands, or that he shall own the legal title or the whole title thereto.

This Missouri statute reads as follows:

"Sec. 650. **Suits to determine interests and quiet title, how and when instituted.** *Any person claiming any title, estate or interest in real property, whether the same be legal or equitable,* certain or contingent, present or in reversion, or remainder, whether in possession or not, *may institute* an action *against any person or persons having or claiming to have any title, estate or interest* in such property, whether in possession or not, to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interest of the parties severally in and to such real property."

With this statute the owner of the equitable title only to land, and that, too, whether in or out of possession thereof, can maintain a suit, to quiet his title thereto, or to remove a cloud thereon, and these enlarged rights of persons interested in lands, created by state statute, are also enforced in the Federal courts. The only difference or exception in the Federal court being that it will not entertain such a suit under such a statute when the defendant is in the actual possession of the land and the plaintiff would have a complete, plain and adequate remedy at law against him.

Wehrman v. Conklin, 155 U. S., 314, 323;
Greely v. Low, Id., 58;
More v. Steinback, 127 U. S., 70 84;
Reynolds v. Crawfordsville Bank, 112 Id., 405;
Hollen v. Challen, 110 U. S., 15;
Arnot v. Griggs, 134 Id., 316;
Grant v. Phoenix Co., 121 U. S., 112;
Hauring v. Rice, 80 Fed. Rep., 162;

Grand Rapids & I. R. Co. v. Sparrow, 36 Id., 210;
Bigelow v. Chatterton, 51 Id., 614;
Ormsby v. Ottman, 85 Id.. 492;
Southern Pine Co. v. Hall, 105 Id., 84;
Huff v. Land & Imp. Co., 57 S. W. Rep., 715; *s. c.* 157 Mo., 65;
Bell v. Woolfork, 175 Mo., 275;
Fox v. Williams, 66 N. W. Rep., 357, *s. c.* 92 Wis., 320.

And defendant, as the owner of the tax-bills in question, claiming them as liens on the lands of the complainant, is, *within the meaning of this statute*, "a person having or claiming to have an interest in such property," and as such is subject to this action. The precise question was decided by the 8th Circuit Court of Appeals as follows: "A state statute empowering a person claiming title to real estate to bring and maintain a suit to quiet his title against a person or persons who claim an 'adverse estate or interest' therein, authorizes the maintenance of such a suit *against any person who claims an adverse* right, title, or interest in or *lien upon, the real estate* in question."

Ormsby v. Ottman et al, 85 Fed. Rep., 492;
See also *Blair v. Hemphill*, 111 Ia., 226;
Chapman v. Brewer, 114 U. S., 170;
Bell v. Woolfolk, 175 Mo., 275-285.

"This statute is highly remedial and beneficial in its purpose." (*Bell v. Woolfolk*, 175 Mo., 285).

The Supreme Court of Wisconsin, interpreting a like statute, has held and declared that such a statute was to be liberally construed and enforced.

Fox v. Williams, 92 Wis., 320.

A bill in equity is a proper remedy under such a statute.

Bigelow v. Chatterton, 51 Fed. Rep., 614;
Bardon v. Land & Improvement Co., 157 U. S., 330;
Reynolds v. Crawfordsville, 112 U. S., 405;
Greeley v. Lowe, 155 U. S., 59.

*The complainant's bill, filed in this case, contains all necessary allegations for relief under this statute.**

(1) The bill alleges, that the complainant owns the 17 named lots of land in Hyde Park, Westport, Missouri ("second" charge Pr. Rec. 1).

(2) The bill also alleges, that the defendant holds a special tax-bill against each of said lots of land of complainant "and that the defendant claims that the said special tax-bills are liens respectively upon and against the real estate aforesaid." ("Third" charge Pr. Rec. 2).

No other allegation is necessary to entitle the complainant to maintain this suit under this Missouri statute.

Union Mill & Mining Co. v. Warren, 82 Fed. Rep., 519;
Ely v. New Mexico, etc. R. R. Co., 129 U. S., 291;
Parley's Park Mining Co. v. Kerr, 130 U. S. 260-1;
Book v. Mining Co., 58 Fed. Rep., 827;
Bell v. Woolfolk, 175 Mo., 278;
Mitchell v. McFarland, 47 Minn., 535;
Palmer v. York, 77 Minn., 20;

XVIII.

The right of complainant to maintain this suit is not lessened nor affected by the fact that he owns only an undivided one half (½) of the 8 lots in block 45.

(*a*) Independent of the statute, (Sec. 650 *supra*) *a tenant in common can sue alone* for any injury to the freehold or to remove a cloud on the title and a petition is not

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* *Defendant filed neither a demurrer nor an exception to complainant's bill for insufficiency on this, or on any other score.*

demurrable for defect of parties because his co-tenants are not made parties to the action.

Goldsmith v. Gilliland, 24 Fed. Rep., 154;
Hicklin v. Marco et al, 56 Id. 549 and on page 555;
The Debris case, 16 Id. 26-34;
Union Mill & Milling Co. v. Danberg, 81 Id. 73;
Davis v. Davis, 89 Id. 533;
Adams et al. v. Howard et al, 22 Id. 658-9;
Williams v. Crabb, 117 Id. 193;
Payne v. Hook, 7 Wall 425;
Horn v. Lockhart, 17 Id. 570;
Platt v. Squire, 12 Metc. (Mass.) 494:
Hang v. Primeau, 98 Mich. 92, 95 and 96;
Hang v. Primeau, 57 N. W. Rep. 25-27;
Sheehan v. Great Eastern Ry. Co., 16 Ch. Div. (Eng.) 59;
O'Donnell v. McIntyre, 37 Hun. (N. Y.) 616;
Affirmed in 116 N. Y. 663.

(*b*) It is only by statute that a tenant in common is permitted to pay his share of the *general* taxes levied against a tract of land owned by himself and others. After so holding the court of appeals then says: "This reasoning *does not apply to the special tax-bill*, which if paid at all, was bound to be paid as an entirety."

Horstmeyer v. Connors, 56 Mo. App., 121;
See also *Jones v. Van Doren*, 130 U. S., 692;
Searle v. Chapman, 121 Mass., 19;
Micklin v. Marco, 56 Fed. Rep., 555;

(*c*) The holder of a valid tax-bill has the option of enforcing the lien for the full amount of the same by suit against a single tenant in common of the land against which the tax-bill is issued.

Granite Co. v. Taylor, 64 Mo. App., 37.

Why shouldn't a single tenant in common have a corresponding right to attack the tax-bill, alone by suit in equity?

He has. See authorities cited under paragraph (*a*) *supra*. See also Mo. R. S., 1899, Sec. 650 quoted *ante* 168.

Bill not multifarious.

What has already been said renders it useless to now argue the question of the multifariousness or misjoinder of matters in the bill. However, it would seem to follow, that as a tenant in common of real estate *can alone* maintain a suit in equity to remove a cloud on the title to the lands of himself and others, that there could be no logical or legal objection to including therein, other property belonging solely to himself, when the title to the latter property is clouded by the same party and by the same illegal subject-matter.

Beach's Modern Equity Practice, Sec. 129;
Story's Eq. Pl. (9th Ed.) Secs. 285 and 536;
Ulman v. Ialger, 67 Fed. Rep. 980;
Platt v. Squire, 12 Metc. (Mass.) 494;
Whitfield & Billups v. Evans, 56 Miss. 500;
Perkins v. Baer, 95 Mo. App., 70.

Too late for defendant to object to misjoinder of causes or multifariousness.

Fichett v. Blows, 74 Fed., 47;
Chew & Goldsborough v. Bank, 14 Md., 299;
Wade v. Pulsifer, 54 Vt., 70;
Labidie v. Hewitt, 85 Ill., 342;
Veghte v. The Routon P. Co., 19 N. J. Eq., 142-144-145;
Green v. Richards, 23 Id., 32;
Annin v. Annin, 24 Id., 184;
Buffalow v. Buffalow, 2 Ired. Eq., 113;
Wales v. Newbould, 9 Mich., 81;
Payne v. Avery, 21 Mich., 524;

Hickman v. Cook, 3 Hump. (Tenn.), 640;
Thurdman v. Shelton, 10 Yerg. (Tenn.), 382;
Oliver v. Piatt, 3 How. (U. S.), 411-412;
Nelson et al. v. Hill et al., 5 Id., 126;
Barney v. Latham, 103 U. S., 215.

"Although the court may take objection (multifariousness or misjoinder of causes of action in a bill) it will not do so unless it deems such a course necessary or proper to assist in the due administration of justice."

Barney v. Latham, 103 U. S., 215, and cases cited.

"When the trouble and expense, which a demurrer for multifariousness if well taken would have been prevented, have been incurred, and the case is fully presented on the record, the court should not interfere and take the objection *sua sponte*."

Chew & Goldsborough v. Bank, 14 Md., 299;
See also *Smith v. Gooch*, 6 Lea (Tenn.), 536.

Judge Story speaking for the Supreme Court says, in *Oliver v. Piatt*, 3 How., 412:

"And at so late a period as the hearing, so reluctant is the court to countenance the objection, that, if it can get on in the cause to a final decree without serious embarrassment, it will do so disregarding the fault or error when it has been acquiesced in by the parties up to that time. A *fortiori* an appellate court would scarcely entertain the objection if it was not forced upon it by a moral necessity."

To the same effect:
Welborn v. Tiller, 10 Ala., 305;
Wade v. Pulsifer, 54 Vt., 71;
See also *Luckett v. White et al.* 10 G. & J. (Md.), 480.

Non-joinder or defect of parties not stated in the answer.

The complainant alleges that he owns lots in Hyde Park addition, against which the tax-bills complained of have been issued, as follows:

All of lots 1, 2, 7 and 8 in block 39; also all of lots 3 and 4, block 41; also all of lot 1, block 49; also the south 17

feet of lots 1 and 2, block 50; *also an undivided half of lots 1, 2, 3, 4, 5, 8, 9 and 10 in block 45.* (See bill charge "second" *ante* page 2).

The answer admits that complainant owns all of said lots except *the undivided half of the lots in block 45*, claimed by complainant in his bill. There is no allegation in the answer naming any absent person, as interested in these lots, in block 45, or as necessary or proper parties to this action. No defect of parties is alleged or suggested therein. As to these lots in block 45, the answer only tenders the issue that complainant had no title and no interest therein. (See answer, Pr. Rec. p. 8).

Too late for defendant to object to any defect of parties.

A defect of parties when appearing on the face of a bill must be taken advantage of by demurrer to the bill. When such defect does not appear upon the face of the bill, any objection, on that score, must be raised by answer.

See Equity Rule No. 52, U. S. Courts.

The defendant answering, without so objecting to the bill filed, is to be deemed a waiver of any and all such objections (if there be any) to the bill as filed in this case, and it is now too late for the defendant, especially since the defendant, by its answer, has put the great labor and expense upon complainant of taking and printing testimony in support of the entire bill. In such case it is said to be the duty of the court to make a decree if it can do so (and it can) without prejudice to any absent party. It is also said that it can make no difference that a defendant, who has hitherto not objected, might be prejudiced thereby.

See Equity Rule No. 53 of the United States Courts.
See particularly on the proposition last stated;
Elmendorf v. Taylor, 10 Wheaton, on pages 166-167;
Mechanics Bank v. Seton, 1 Peters, 299;
Railroad v. Harris, 12 Wall, 66;

Keller v. Ashford, 133 U. S., 610; (also page 626);
Burbank v. Bigelow, 154 Id., 558;
McGahan v. Bank, 156 Id., 236;
Adams v. Howard, 22 Fed. Rep., 656;
Seccomb v. Wurster, 83 Id., 856;
Story, Eq. Pleadings, § 542;
Freeman, Co-tenancy and Partition, Sec. 353, *et seq*;
Smith v. Gooch, 6 Lea (Tenn.) 536;
Smith v. Bartholomew, 42 Vt., 356;
Schwoerer v. Boylston Market, 99 Mass., 295;
Starne v. Farr, 17 Ills. App., 491;
Sheenan v. Great Eastern Ry. Co., 16 Ch. Div. (Eng.), 59.

NOTE.—The above cited state court decisions are based upon the chancery practice as existing anterior to or exclu. sive of the code practice.

In *Schwoerer v. Boylston Market Association*, *supra*, the Massachusetts court accurately expressing *the rule stated and enforced in the other cases*, said:

"When the defect is formal and technical merely, and is only objected to at the hearing, and especially if other parties are needed only for the defendant's protection, the decree will not be delayed, if the non-joinder produces no other prejudice to the rights of the parties before the courts. It is the familiar rule that some defenses cannot be made in all stages of the cause with equal effect, but will be regarded as waived when expense and delay have been incurred which might have been avoided." (99 Mass., 295).

XIX.

It is now respectfully submitted that the special tax-bills for each of the 3 street pavements are void and should be so declared herein, and that the part of the judgment and de-

cree for the defendant, which adjudged valid the special tax-bills for the Main street and Baltimore avenue pavements, and costs to defendant, should be reversed.*

RICHARD H. FIELD,
in Person.

** The motion of complainant to dismiss defendant's appeal, submitted to the court on October 26th, 1903, is yet undecided. On Monday, Nov. 2nd, 1903, the court made an order announcing that this motion would be acted upon with the merits of the case. Complainant's Printed Brief, in support of that motion, is on file therewith in this court. To paragraph 4, on page 11 of which brief complainant asks to be added, the decision of this court in Anglo American Provision Co. v. Davis Provision Co., 24 Sup. Ct. Rep., 93.*

FILE COPY.

1903

IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1903.

Office Supreme Court U. S.
FILED
OCT 26 1903
JAMES H. McKENNEY,
Clerk.

BARBER ASPHALT PAVING COMPANY,
Appellant,
vs.
RICHARD H. FIELD,
Respondent.

No. 202.

APPELLANT'S BRIEF

IN OPPOSITION TO MOTION TO DISMISS.

WILLIAM C. SCARRITT,
JOHN K. GRIFFITH,
ELLIOTT H. JONES,
Counsel for Appellant.
EDWARD L. SCARRITT,
Of Counsel.

18,789

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IN OPPOSITION TO MOTION TO DISMISS.

STATEMENT.

This is a suit in equity begun in the Circuit Court of the United States for the Western Division of the Western District of Missouri at Kansas City, whereby the complainant, Richard H. Field, has sought to have adjudged void and a decree entered cancelling certain special tax bills owned by the defendant, issued by the city of

Westport in that jurisdiction to evidence the lien of certain special assessments levied against the complainant's city lots to pay for the cost of paving three certain streets (Main and Wyandotte streets and Baltimore Avenue), in that city. Complainant's bill charged that the special assessments were void for a number of reasons, among which were, that the statute of Missouri (Act of April 11, 1895, R. S. 1899, Vol. 2, secs. 5982-5989) which conferred power upon the City of Westport to cause its streets to be paved at the expense of the abutting lands, under the authority of which the special tax bills in question were issued, violated Section one of the Fourteenth Amendment to the Constitution of the United States and was void (Transcript of record p. 2); that the official proceedings of the City of Westport authorizing the execution of the work and the contract therefor violated Article one of Section eight of the Constitution of the United States, relative to the regulation of commerce with foreign nations among the several states (Transcript p. 22); that the official proceedings of the city of Westport and the terms of its contract for this work violated the Act of Congress of July 2nd, 1890, relative to the protection of trade against unlawful restraints and monopolies. (Transcript p. 22.) The bill of complaint also contained this allegation:

"And the order for the work aforesaid, upon each of the three streets aforesaid, was in each case not due to any necessity therefor, or because the said board of alderman deemed the same, or either of them, necessary to be done, *but because* of the lobbying and conduct aforesaid of the agents and servants of the defendant owners, and because of their lobbying with the board of aldermen of the city of Westport, and the defendant's undue, and illegal, influence over the board of aldermen of said city of Westport." (Transcript p. 4.)

It developed in the evidence that two of the streets (Wyandotte and Main) had, about five years before the asphalt pavement was laid and about ten years before this suit was tried, been covered over with a common limestone macadam, which macadam, at least on Wyandotte street, was not entirely worn out when the asphalt pavement was laid. This fact was understood in advance by every one conversant with the proceedings, including the complainant, for the specifications for the asphalt pavement on that street provided that the old macadam then upon the street should be used as a base for the new and modern pavement, and a less price for that pavement was charged by the contractor by reason of the use of that old macadam.

The answer put in issue the jurisdiction of the Circuit Court on the ground that the amount in dispute, that is, the amount of all the assessments against the lots to which complainant held the legal title, did not exceed, exclusive of interest, the sum of two thousand dollars, and joined issue on the allegations of the complainant's bill. (Transcript pp. 7, 19.) There was no cross bill, nor did the answer contain any prayer for any other relief than the dismissal of complainant's bill, and for costs.

On a trial of the case before the Honorable Smith McPherson, of Red Oaks, Iowa, sitting as Circuit Judge at Kansas City, a decree was entered denying the complainant the relief sought in respect to two of the streets, and granting the relief sought as to one of the streets. And conforming to the prayer of complainant's bill, the special tax bills evidencing assessments levied to pay for that street, viz.: Wyandotte street, the contract for paving that street and the official proceedings of the city of Westport relative to the pavement of that street were declared to be void, and relief from the assessments charged for the work on the other two streets was denied. (Transcript p. 23.) There is nothing in the decree to indicate on what ground the learned judge reached his conclusions. In the opinion filed by him, however, it appeared that he ruled against the complainant's contention on the federal questions and held (notwithstanding as we shall contend on the merits the pleadings raised no such issue, nor did the record justify his conclusion) that because an old macadam pavement had been laid upon Wyandotte street five years previous to the construction of the asphalt pavement, and was at the latter date in a reasonably safe condition for travel, the municipal authorities of the city of Westport were without authority to repave the street with asphalt and charge the cost thereof in special assessments against the abutting lands. (Transcript p. 520.)

The allegations of the complainant's bill apply to all of these proceedings alike, that is, the infirmities mentioned were charged to be common to each street improvement proceeding. The denials of the answer were to those allegations in respect to the tax bills issued in payment of the improvements on those streets. The allegations of the answer putting in issue the jurisdiction of the court were in respect to the amount of the assessments against complainant's lots on all those streets and were formulated on the theory adopted by complainant in constructing his bill that there was but one cause of action.

There was but one suit; one decree. From that decree both

complainant and defendant have appealed to this court. The complaint of complainant now is that the decree granted him two-thirds less than the relief he sought. The complaint of the paving company is that the decree awarded a modicum of relief to the complainant.

One record was made up which was filed in this court by complainant, which record, conformable to the practice, has been printed at the equal cost of both parties.

The complainant now moves this court to dismiss the defendant's appeal on the ground that this court is without jurisdiction to hear and determine the same, his contention being that the defend ant's appeal should have been prosecuted to the United States Cir cuit Court of Appeals.

SUGGESTIONS AGAINST MOTION TO DISMISS.

This court has jurisdiction of the paving company's appeal by authority of Section 5 of the Judiciary Act of 1891, which confers upon this court jurisdiction of appeals from circuit courts in the following cases:

"In *any case* that involves the construction or application of the Constitution of the United States."

"In *any case* in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

This case comes within the terms of both of those provisions of the statute.

(1) The case is one in which the law of a state is claimed to be in contravention of the Fourteenth Amendment to Constitution of the United States; because the complainant's bill, after specifically pleading the act of the General Assembly of Missouri relative to cities of the fourth class under which the assessment in question was levied, recited:

"Fourth. Your orator states that all of the real estate aforesaid is vacant and unimproved, and a greater part of the other lands fronting on the street pavements aforesaid are vacant and unimproved, and were at the times herein named; that your orator was not at any time herein named a resident of said city of Westport, but was at all of the times herein named a resident of Kansas City, Missouri, and the owner of the real estate hereinbefore described;

That Sections 88 to 95 inclusive of the act of the General Assembly of the State of Missouri aforesaid, under which the tax bills in question are claimed by the defendant as liens upon the complainant's real estate, deprive the complainant of his said real estate without due process of law, and deny the complainant the equal protection of the laws afforded to resident owners of property in said city of Westport and take his property for the private use of said residents, and violate Section 1 of the Fourteenth Amendment to the Constitution of the United States." (Transcript p. 2.)

The answer raised an issue as to the constitutionality of that law in this language:

"This defendant denies that the act of the General Assembly

of the State of Missouri referred to and described in the bill of complaint, takes or attempts to take from the plaintiff the said property for public use without just compensation, or that it deprives him of his said property without due process of law, or that it violates section one of the Fourteenth Amendment to the Constitution of the United States." (Transcript p. 10.)

And the complainant's statement of errors, upon which he relies in this court, contains the following:

"7. The court erred in holding that sections 88 to 95, inclusive, of the act of the General Assembly of the State of Missouri, entitled 'An act to repeal article five (5) of chapter thirty (30) of the Revised Statutes of Missouri of 1889, and certain amendments thereto; said article five (5) being entitled "Cities of the fourth class," and to enact in lieu thereof a new article providing for the government of cities of the fourth class,' approved April 11th, 1895, did not violate section one of the Fourteenth Amendment to the Constitution of the United States.

"8. The court erred in not adjudging and decreeing void, and in not cancelling, the special tax bills in question for the Main street and Baltimore avenue paving, because the said sections 88 to 95, inclusive, of the State legislative act aforesaid, violated section one of the Fourteenth Amendment to the Constitution of the United States." (Transcript p. 522.)

(2) This is a case that involves the construction or application of the Constitution of the United States, because complainant alleged in his bill:

"Tenth. That with a view to lessen and which tended to lessen full and free competition in the importation, manufacture and sale of other good and useful brands of asphalt for street paving, the board of aldermen of said city of Westport at the instigation of defendant, and by arrangement and agreement and combination with the defendant, specified and required in the resolutions, ordinances and contracts with the defendant, that each of the street pavements here in question should 'consist of a genuine Trinidad Lake asphalt pavement.'" (Transcript p. 5.)

"That the defendant, the city engineer, the board of aldermen and mayor of said city of Westport, conspiring, combining and contracting in restraint of trade and commerce among the several

states and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri, caused to be specified in the resolutions and ordinances of said city and contracts for the paving in question, that it should consist of a genuine Trinidad Lake asphalt, thereby meaning and intending the asphalt produced and existing in Trinidad Lake, of the island of Trinidad, without the United States and within the domain of another nation, and the defendant, at and before the dates alleged in this bill, monopolized and attempted to monopolize, combined and conspired with said city authorities and other persons unknown to complainant, to monopolize the trade and commerce among the several states as to the importation, sale and use of Trinidad Lake asphalt, whereby it had, and attempted to have, at the times here in question, the exclusive control of the importation, the sale and use of said asphalt in and to the city of Westport and Kansas City, Missouri, so that when the defendant induced and persuaded the city authorities of said city of Westport to specify genuine Trinidad Lake asphalt, in its resolutions, ordinances and contracts for the pavements in question, it had monopolized and attempted to monopolize a part of the trade and commerce of the several states and with foreign nations, all in violation of * * * the commerce clause of section eight of article one of the Constitution of the United States." (Transcript p. 22.)

The proof was to the effect that Trinidad Lake asphalt was imported from the Island of Trinidad, South America. Upon this fact, coupled with the requirement of the contract that genuine Trinidad Lake asphalt be used in the work in question, the complainant raised in the court below the contention that the contract was illegal and void in that it, by the requirement that the material used should come from the Island of Trinidad, interfered with the commerce of the nation with foreign nations and the commerce among the several states contrary to the commerce clause of Section eight, Article one of the Constitution of the United States. That such was the contention of complainant in the court below is further shown by the following excerpt from the opinion of the trial judge:

"There is evidence tending to show that good asphalt, and quite as good as Trinidad, can be obtained from Bermuda, Mexico, and from places in the United States. On such facts it is contended that the city had no right to limit the contract to Trinidad, and that in so doing, the commerce clause of the constitution was violated, and that the federal anti-trust statutes were likewise violated.

* * * I do not believe the point is well taken." (Transcript p. 519.)

And in his statement of errors, relied upon in this court, complainant has alleged :

"26. The court erred in not adjudging and decreeing void, the special tax bills for the Main Street pavement in question, when the ordinance No. 1803, of the board of aldermen, of the city of Westport, ordering said street pavement, provided that the pavement should consist of 'a genuine Trinidad Lake asphalt pavement' and excluded from the market and from being contracted for use, and from being in said street pavement, the asphalt of other foreign countries and of the United States and violated the commerce clause in section 8 of article I of the Constitution of the United States." (Transcript p. 526.)

That to this court an appeal will lie by either party to such a suit as the one at bar seems no longer to be an open question.

In *Chappell v. United States*, 160 U. S., 499, opinion by Mr. Justice Gray, the court said :

"No question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute, above cited (§5), has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of the jurisdiction or of merits."

This language is expressly approved in *Robinson v. Caldwell*, 165 U. S., 359, wherein, after quoting the language above recited, the court, in an opinion by Mr. Justice Harlan, said :

"As the construction of a treaty made under the authority of the United States and the constitutionality of an act of Congress were drawn in question in the Circuit Court, this court could have taken cognizance of the case upon the appeal from the circuit court and determined those questions, and having thus acquired jurisdic-

tion of the cause, it could have determined any question of the jurisdiction of the circuit court appearing upon the record, whether certified or not." 26 Stat. at L. 826, chap. 517, §5.

In *Loeb v. Trustees of Columbia Township*, 179 U. S. 472, opinion by Mr. Justice Harlan, the court said:

"It is said that, even if the record shows such a claim to have been made, it will not avail the plaintiff; for it is argued, when the jurisdiction of the circuit court is invoked by the plaintiff only on the ground of diverse citizenship, a claim by the *defendant* of the repugnancy of a state law to the Constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the circuit court sustaining such claim. Such an interpretation of the fifth section is not justified by its words.

"Our right of review by the express words of the statute extends to 'any case' of the kind specified in the 5th section. And the statute does not in terms exclude a case in which the federal question therein was raised by the defendant. That section differs from §709 of the Revised Statutes relating to the review by this court of the final judgment of the highest court of a State in this, that under the latter section we can review the final judgment of the State court upon writ of error sued out by the party who is denied a right, privilege or immunity specially set up or claimed *by him* under the Constitution or laws of the United States; whereas the circuit court of appeals act does not declare that the final judgment of a circuit court in a case in which there was a claim of the repugnancy of a state statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, *if a claim is made in the Circuit Court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant.* * * *

"When the question is whether a judgment of the Circuit Court of Appeals is final in a particular case, it may well be that the jurisdiction of the Circuit Court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff invoked the authority of that court only upon that ground; because in such case the jurisdiction of the court

needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. But no such test of the jurisdiction of this court to review the final judgment of the Circuit Court is prescribed by the fifth section. Our jurisdiction *depends only on the inquiry whether that judgment was in a case in which it was claimed that a State law was repugnant to the Constitution of the United States.*"

The opinion just referred to quotes with approval the following statement of the rule by Mr. Justice Gray, who delivered the opinion in *Holder v. Aultman M. & Co.*, 169 U. S. 81, and who in discussing the scope of the Act of 1891, uses this language:

"Upon such a writ of error, differing in these respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. *Whitten v. Tomlinson*, 160 U. S. 231, 238; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685."

This is not only a case involving the construction or application of the Constitution of the United States and the constitutionality of a State law but the same question is involved in the paving company's appeal.

It will not do for the complainant to urge that the construction or application of the Constitution and the validity of a state statute is not involved in this appeal because the opinion of the trial judge, filed in the case, indicated that he based that part of the decree of which the paving company complains upon a reason other than those involving a federal question, for he might have passed the same judgment in this case and been persuaded thereto by reason of a violation of a federal right. The reason or ground of a decision is not a property right. A litigant will not be allowed a hearing upon an appeal merely because he complains of the reason or ground upon which the appeal is based and not of the judgment itself.

New Orleans v. Emsheimer, 181 U. S. 153.

It goes without saying that in the event the paving company should urge in this court that the reason given by the trial judge for decreeing a portion of its tax certificates to be void had no foundation in the pleadings, or in the proofs, or that the conclusion reached by the trial court in this respect was erroneous, it would be competent for the complainant to make answer that those bills were void and the decree of the trial court in that respect should be upheld because complainant's contention as to the unconstitutionality of the Missouri statute was well founded; or because his contention that the ordinance of the city of Westport and its contract for this pavement, in that they designated Trinidad Lake asphalt as the material of which the pavement was to be constructed, constituted an attempt to regulate the commerce of the nation; and were illegal and void because inimical to section eight, article one of the Federal Constitution. In other words, that though the trial judge's reasoning might be wrong, upon the whole record his judgment in so far as it held void the tax bills in question upon this appeal was right. If this court is convinced of the soundness of the legal propositions contended for by the complainant in the federal questions he has raised, it will result in affirming the judgment determining the special tax bills involved in this appeal to be void.

It is elementary that a judgment or decree which is upon the record for the right party will not be reversed for errors in declarations or conclusions of law on the part of the trial court. *Moore v. Lindell Ry Co.*, 75 S. W. Rep. (Mo.) 672; *Haven v. Railroad*, 155 Mo. 223; *Ellerbe v. Bank*, 109 Mo., 445. It will not do for us to assume in determining what is involved in the paving company's appeal in this case that the complainant has no confidence in the federal questions which he urges with such vehemence and apparent candor as the basis of his own appeal.

The court at the proper time will consider and determine the paving company's contention as to the jurisdiction of the Circuit Court, not because the paving company appealed to this court by reason of the case being one involving the jurisdiction of that court, but because, having jurisdiction of the case under the provisions of the judiciary act hereinbefore quoted, it will consider and determine all questions presented by the record.

In *United States v. Sayward*, 160 U. S., 493, opinion by Mr. Justice Gray, it is said:

"But no question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute, above cited, has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has the power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits. *Ekiu v. United States*, 142 U. S., 651; *Horner v. United States* (No. 2), 143 U. S., 570, 577; *United States v. Jahn*, 155 U. S., 109, 112, 113."

In *Scott v. Donald*, 165 U. S. 58, opinion by Mr. Justice Shiras, it is said:

"It is also argued that the amounts involved in the respective suits were not sufficient to give jurisdiction to the Circuit Court. Although the question of the jurisdiction of the court below has not been certified to us in the manner provided by the fifth section of the Judiciary Act of March 3, 1891, yet, as the case is before us, in a case in which the law of a state is claimed to be in contravention of the Constitution of the United States, under another clause of that statute, we have jurisdiction of the entire case and of all questions involved in it. *Horner v. United States*, 143 U. S. 570; *Carey v. Houston & T. C. R. R. Co.*, 150 U. S. 181; *Chappell v. United States*, 160 U. S.. 499."

In *United States v. Jahn*, 155 U. S., 109, opinion by the Chief Justice, it is said:

"The provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however valuable in the interest of brevity of record. * * * The Act certainly did not contemplate two appeals or writs of error at the same time by the same party to two different courts, nor does it seem to us that it was intended to compel a waiver of the objection to the jurisdiction altogether or of the consideration of the merits. * * * The Act was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive bur-

den of general litigation, but the rights of review by appeal or writ of error, and of invoking the supervisory jurisdiction of this tribunal, were sought to be amply secured and should not be circumscribed by too narrow a construction."

In *Horner v. United States*, 143 U. S. 570, opinion by Mr. Justice Blatchford, it is said:

"We are further of the opinion that where an appeal or writ of error is taken direct to this court under section five of the Act of March 3, 1891, in a case in which the constitutionality of a law of the United States is drawn in question, this court acquires jurisdiction of the entire case, and of all questions involved in it, and not merely the question of the constitutionality of the law of the United States. This is shown by the fact that, under section five, where an appeal or writ of error is taken direct to this court, in a case in which the jurisdiction of the district court or of the circuit court is in issue, it is specifically directed that 'the question of jurisdiction alone shall be certified to the supreme court from the court below for decision,' but there is no kindred limitation prescribed in regard to any of the other cases in which jurisdiction in this court of appeals or writs of error is given by section five."

It is respectfully submitted that the motion of Richard H. Field to dismiss the appeal of the Barber Asphalt Paving Company is without merit and should be overruled.

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FILED
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JAMES H. McKENNEY,

IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1903.

RICHARD H. FIELD,
Appellant,
vs.
THE BARBER ASPHALT PAVING COMPANY.
} No. 201.

THE BARBER ASPHALT PAVING COMPANY,
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} No. 202.

STATEMENT AND BRIEF

FOR BARBER ASPHALT PAVING COMPANY,
RESPONDENT AND APPELLANT.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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EDWARD L. SCARRITT,
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18,797 and 18,798.

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18,797 and 18,798.

STATEMENT.

THE NATURE OF THE SUIT:

These two causes are the cross appeals of complainant and defendant respectively from a decree in equity of the Circuit Court within the Western Division of the Western District of Missouri. The suit was instituted in that Court in the district of his residence by complainant, Richard H. Field, a citizen and resident of Kansas City, Missouri, against the Barber Asphalt Paving Company, a corporation, and a citizen and resident of the State of West Virginia, for the purpose of having adjudged invalid and canceled the liens, against certain city lots or tracts of land claimed by the complainant, of certain special tax bills, issued to the Paving Company by the City of Westport, a municipality of Missouri, lying immediately adjacent to Kansas City on the south, in part payment of the contract price of paving three certain streets, viz., Main street, Baltimore avenue and Wyandotte street, in that city.

The tax bills were issued after the completion of the pavements. Those issued in payment of the price of the work on Main street are dated October 5, 1897 (Transcript of Record, p. 309); those on Baltimore avenue and Wyandotte were dated November 18, 1897. (Transcript of Record, pp. 313, 329.) This suit was begun January 4, 1900. (Transcript of Record, p. 1.) The jurisdiction of the Federal Court was invoked by complainant upon the grounds of the alleged invasion of his rights under the Constitution and laws of the United States and of adverse citizenship.

Because the suit is one to remove a cloud from the title to real estate equity takes cognizance of the action. That such is the nature of the suit and the sole ground of equitable jurisdiction is apparent. The bill alleges complainant's ownership of the described lots; alleges that the special tax bills in questions are apparently valid liens on his lands but by reason of certain alleged facts are void. And to remove this cloud relief in equity is sought. The prayer of the bill *inter alia* is: "That the defendant be required to bring said tax bills into this court and cancel and remove the same as claims and clouds against the real estate aforesaid of your orator." (Transcript of Record, p. 6.) The decree of the Circuit Court as to the Wyandotte street special tax bills, which in that respect alone was favorable to complainant, recites: "That the defendant within sixty days bring the special tax bills aforesaid into this court and here cancel and remove the same as claims and clouds against the real estate aforesaid." (Transcript of Record, p. 24.)

FACTS RELATIVE TO JURISDICTION:

The complainant holds the legal title to certain of the lots described in his bill of complaint, against which the aggregate assessment evidenced by the special tax bills referred to is less than $2,000, namely, $1,783.22. The complainant claims an equitable interest in a fractional part of other lots, the legal title to which is vested by general warranty deed, duly executed and recorded in the recorder's office of the appropriate county, in Annie Camp Field. (Transcript of Record, p. 199.) He offered evidence tending to prove that he had an equitable claim to an undivided one-half interest in these lots, which evidence was objected to on the part of the Paving Company as being incompetent, irrelevant and immaterial. (Transcript of Record, pp. 201, 202, 203, 204.) One-half of the total assessment against the lots in which he claims an equitable interest amounts to $1,583.21. So that if we may add the amount of the assessment that would ratably be borne by the alleged equitable interest to the amount of the assessment against the lots to which complainant has the legal title, the jurisdictional amount is involved in this suit, otherwise it is not. The jurisdiction of the court was impeached by defendant's pleading. (Transcript of Record, p. 13.) The Circuit Court denied this contention of defendant; and that denial is assigned as one of the grounds of the Paving Company's appeal.

The Paving Company's contention is that because complainant claims an equitable interest in certain lots, the legal title to which it is admitted is vested in Annie Camp Field, he cannot add the amount of the assessment which would fall to his asserted equitable interest in the Annie Camp Field lots to the sum chargeable against the lots to which he holds the legal title in order to expand the dimensions of the cloud obscuring his legal title to the extent of the pecuniary value required to give the Circuit Court jurisdiction.

CHARTER REQUIREMENTS RELATIVE TO PAVING STREETS:

The method prescribed by the charter of the City of Westport, being the statutory charter for cities of the fourth class in Missouri, may be briefly summarized thus: (The law as enacted is to be found in the Laws of Missouri, 1895, page 65, *et seq.*, and is published in revision in the Revised Statutes of Missouri, 1899, Vol. 2, pp. 1402, 3 at the sections hereinafter cited.)

When the Board of Aldermen deem it necessary to pave any street, or any part thereof, within the limits of the city for which

a special tax is to be levied, the Board of Aldermen shall by resolution declare such work or improvement necessary to be done and cause such resolution to be published in some newspaper published in the city for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion in the publication of such resolution, file with the city clerk their protest against such improvement, then the Board of Aldermen shall have power to cause such improvement to be made, and to contract therefor and to levy a tax as herein provided; and the finding of the Board that a majority of such owners have not filed a protest shall be conclusive and final. Contracts shall be let to the lowest and best bidder upon the plans and specifications therefor filed by the city engineer with the city clerk; not less than one week's advertisement for bids being made in some newspaper published in the city. R. S. Mo., 1899, Sec. 5989.

An estimate of the cost of the work of paving shall be made by the city engineer or other proper officer, and submitted to the Board of Aldermen before any contract for such work is entered into; and no contract shall be entered into for such improvement at a price exceeding such estimate. R. S. Mo., 1899, Sec. 5985.

The cost of paving streets, or parts thereof, shall be levied as a special assessment upon all lots or pieces of ground on either side of such street, or part thereof, abutting thereon along the distance improved in proportion to the front foot. R. S. Mo., 1899, Sec. 5982.

The cost of paving squares and areas formed by the crossing and meeting of streets shall be levied as a special assessment against the block or square contiguous to each and pro rata against the lots or pieces of ground in such block or square abutting on the street improved. R. S. Mo., 1899, Sec. 5983.

The assessments made for paving all streets shall be known as special assessments for improvements, and shall be levied and collected as a special tax; and special tax bills shall issue therefor and be paid in the manner provided by ordinance; they may bear interest thirty days from date at the rate of eight per cent. per annum; and every such special tax shall be a lien against each lot or tract of land described in the same until the same is paid. R. S. Mo., 1899, Sec. 5984.

All tax bills issued for paving shall be assignable and collectible in an action brought in the name of the city to the use of the holder thereof, but the city shall not in any event be liable for any costs that may accrue in such action. Such special tax bills in any action thereon shall be *prima facie* evidence of the regularity of

the proceedings for such special assessment, of the validity of the bill, of the doing of the work, and of the furnishing of the materials charged for, and of the liability of the property to the charge stated in the bill. R. S. Mo., 1899, Sec. 5986.

Property owners have the right upon request to have such assessments made payable in three annual installments. R. S. Mo., Sec. 5987.

These sections of the charter law under review are printed in full as an Appendix to this brief.

The General Assembly of Missouri conformable to constitutional mandate (Mo. Const., Art. 9, Sec. 7) has provided by law for the organization and the classification of the cities of the state in four classes, and has defined the powers of each class by general laws. R. S. Mo., 1899, Vol. 2, Chap. 91, p. 1223.

The City of Westport is a municipality of about the same age as Kansas City; indeed in the early days its importance was greater than its more strenuous rival, for then Kansas City was known as Westport Landing. At the time of the happening of the events out of which this controversy arose, it existed as a city of the fourth class, under the laws of Missouri, and had its northern boundary coincident with the southern boundary of Kansas City: the center of Thirty-first street being the dividing line. The cities were consolidated, so that in law they became one municipality, as they had long been in fact, by a vote of the qualified voters of the city, taken on the 2nd of December, 1897. Grand avenue, or Main street as it is called where located in the limits of old Westport, is the main thoroughfare one hundred feet wide, extending in a north and south direction, through the eastern part of the business section of Kansas City to the eastern part of the business section of what was formerly Westport. Baltimore avenue is the street next west and parallel to Main street, and Wyandotte street is the street next west and parallel to Baltimore avenue. Wyandotte street runs through the business center of the old City of Westport. These three streets are common both to Kansas City and Westport, and may be said to be the central north and south streets of the twin cities. And along them at the locality under review are located some of the handsomest and most fashionable residences of Kansas City. (Transcript of Record, pp. 75-77.)

COMPLAINANT'S CONTENTIONS UPON HIS APPEAL:

The complainant's bill was amended three times and parts of it (owing to complainant's commendable consideration) have been

omitted in the printing. Its allegations material to complainant's appeal we deem to be the following:

(1) "That Sections 88 to 95, inclusive, of the act of the General Assembly of the State of Missouri aforesaid (the ones we have heretofore summarized and which we print as an appendix hereto), under which the tax bills in question are claimed by the defendant as liens upon complainant's real estate, deprive complainant of his said real estate without due process of law, and deny the complainant the equal protection of the laws afforded to resident owners of property in the City of Westport, and take his property for the private use of said residents, and violate Section one of the Fourteenth Amendment to the Constitution of the United States." (Transcript of Record, p. 2.)

The contention of appellant under this allegation seems to be that Section 95 of said act, being Section 5898, R. S. Mo., 1899, which, in conferring power upon the Board of Aldermen of such cities to order street improvements to be paid for by special assessments against the abutting lands, requires that the Board first publish a resolution declaring such work or improvement necessary to be done, and cause that resolution to be published in some newspaper published in the city for two consecutive weeks, and further prescribes that "if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of such resolution, file with the city clerk their protest against said improvement, then the Board of Aldermen shall have the power to cause such improvement to be made, to contract therefor and to levy a tax as herein provided," is an unlawful discrimination against non-residents of the city. It cannot escape instant notice that this absence of a remonstrance by a majority of the resident owners affected by the contemplated improvement is by the legislative department of the state made a prerequisite to the exercise by the Board of Aldermen of the power of enacting any ordinance requiring a street to be paved. It is unquestioned upon this record that complainant, Richard H. Field, was a resident of Kansas City, which immediately adjoined the city of Westport, and that he lived in the vicinity of the lots in question; that he had actual knowledge of the preliminary steps taken to improve the streets upon which his lots abutted, for he, in testifying, said: "When I first learned they *were going* to pave Main street (the first one improved), and the contract had been actually let (May 17, 1897, Transcript of Record, p. 154), I met Mr. McGowan," etc. (Transcript of Record, p. 198); and referring to Wyandotte street, he said: "It was done very quickly, but *I had information it would* be done or had been done," etc. (Transcript of Record, p. 199);

that he had notice, by publication of the preliminary resolution declaring the improvement necessary, and advertisement for bids, that the work was contemplated and was in progress (Finding of Court, Transcript of Record, p. 518); and that he never remonstrated or attempted to remonstrate to the municipal authorities of Westport against the improvement of any of the streets in question.

(2) "Sixth. For the purpose of forestalling any remonstrance from the residents of the City of Westport owning property fronting on such pavements, before any plans or specifications for them or either of them were made and filed in said City of Westport, and before any resolution or ordinance ordering such streets or either of them to be paved were passed, the defendant circulated among such residents a petition in each case asking the Board of Aldermen of said City of Westport to cause such work to be done, and induced the said residents of the late City of Westport to sign said petition and to refrain from remonstrating against such improvements, by promises of rebates on the amount of tax bills to be issued against their property for said improvements, and by other favors to such residents upon the cost of such work, and thereupon defendant caused to be drawn plans and specifications, resolutions and ordinances for the work, which were adopted by the Board of Aldermen of said City of Westport, and the order for the work aforesaid, upon each of the three streets aforesaid, was in each case not due to any necessity therefor, or because the said Board of Aldermen deemed the same, or either of them, necessary to be done, but because of the lobbying and conduct aforesaid of the agents and servants of the defendant owners, and because of their lobbying with the Board of Aldermen of the City of Westport, and the defendant's undue and illegal influence over the Board of Aldermen of said City of Westport." (Transcript of Record, pp. 3, 4.)

The petitions referred to in this allegation are petitions of common right or what may be designated as common law petitions. They are not petitions prescribed by the charter, nor are they a prerequisite to the exercise of the power of the legislative authorities of the city to enact ordinances to improve its streets. There is no evidence—not a scintilla—in the record tending to show any corrupt acts or conduct on the part of any person connected with the Paving Company, or the city government, in respect to these petitions or the improvement proceeding. The trial judge in his Findings said: "I have searched the record and find no evidence of corruption. * * I fail to find evidence that there was any sharing of profits with any of the aldermen, or of receiving by or offering rebates to any of the property owners." (Transcript of Record, p. 519.)

(3) "Ninth. That the defendant had the exclusive control

of the importation, sale and use of the genuine Trinidad Lake asphalt in and to the said City of Westport, at the times of the specification of the same by the City of Westport, for the three street pavements here in question." (Transcript of Record, p. 5.)

The proof adduced by complainant himself does not sustain this charge. (Transcript of Record, pp. 40, 113.) There were competitive bids on this identical work. (Transcript of Record, p. 88.) In the Findings of the trial court it is said: "He (complainant) contends that the defendant has a monopoly of Trinidad asphalt. The evidence does not show this to be so." (Transcript of Record, p. 519.)

(4) "Tenth. That with a view to lessen and which tended to lessen full and free competition in the importation, manufacture and sale of other good and useful brands of asphalt for street paving, the Board of Aldermen of said City of Westport, at the instigation of the defendant, and by arrangement and agreement and combination with the defendant, specified and required in the resolutions, ordinances and contracts with the defendant, that each of the street pavements here in question should 'consist of a genuine Trinidad Lake asphalt pavement.'" (Transcript of Record, p. 5.)

There is no evidence tending to show that any other than legitimate arguments were used by, or on behalf of defendant, to induce the property owners to request, or the Board of Aldermen to adopt, Trinidad Lake asphalt as the matrix of the street pavements in question. Complainant's own proof establishes the fact that the people of Westport and Kansas City generally believed Trinidad Lake asphalt to be the most successful street paving material known. The durability and success of pavements laid with that material in Kansas City had been remarkable. The streets constructed of it there have endured in reasonably good condition without any repairs or expense to abutting property owners for a period of twelve or fifteen years.

Mr. J. C. Tate, agent of the Mastin estate, which was, concurrently with the complainant, contesting Westport tax bills, testified:

"Q. Now, these persons connected with the Barber Asphalt Paving Company represented to the property owners, did they not, that they had the best paving material known? A. Yes, sir.

"Q. Isn't it a matter of general belief among the people of Kansas City that they have the best paving material known? A. Well, that is a question I don't know about. Up to a few years ago (this deposition was given three years after the pavement in question was laid) it was thought they had decidedly the best mate-

rial, but recently I have heard the Gilsonite's spoke of in very high terms. * * *

"Q. Isn't it a fact that the Barber Asphalt Paving Company has laid 367,000 yards against the Gilson's 10,000? A. I don't know what the proportion was. I simply know that the Barber Company laid more pavement than any of the other asphalt companies." (Transcript of Record, p. 99.)

(5) "That the defendant, the city engineer, the Board of Aldermen, and Mayor of said City of Westport, conspiring, combining and contracting in restraint of trade and commerce among the several states, and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri, caused to be specified in the resolutions and ordinances of said city and contracts for the paving in question, that it should consist of a genuine Trinidad Lake asphalt, thereby meaning and intending the asphalt produced and existing in Trinidad Lake, of the island of Trinidad, without the United States, and within the domain of another nation, and the defendant at and before the dates alleged in this bill monopolized and attempted to monopolize, combined and conspired with said city authorities and other persons unknown to complainant, to monopolize the trade and commerce among the several states as to the importation, sale and use of Trinidad Lake asphalt, whereby it had, and attempted to have, at the times here in question, the exclusive control of the importation, the sale and use of said asphalt, in and to the City of Westport, and Kansas City, Missouri, so that when the defendant induced and persuaded the city authorities of said City of Westport to specify genuine Trinidad Lake asphalt in its resolutions, ordinances and contracts for the pavements in question, it had monopolized and attempted to monopolize a part of the trade and commerce of the several states and with foreign nations, all in violation of the act of Congress contained in the act of July 2nd, 1890, 'to protect trade and commerce against unlawful restraints and monopolies.' And the said resolutions and ordinances of said City of Westport also violate the commerce clause of Section eight of Article one, of the Constitution of the United States." (Transcript of Record, p. 18.)

All the material allegations of complainant's original bill, and of the amendments thereto, were specifically denied by defendant. (Transcript of Record, pp. 7 to 14, 19 to 21.)

PROOF OF THE CONDITION OF THE THREE STREETS; WHY DEVELOPED:

In the eighth charge of complainant's bill (Transcript of Record, p. 4), the claim is made that neither of the three streets in question had been brought to the established grade before the defendant undertook to carry out its contracts to pave those streets, but that the cost of bringing *the streets to grade* (which cost under the charter is required to be paid out of the general revenue fund, R. S. Mo., 1899, Sec. 5980,) was unlawfully allowed to defendant and included in the tax bills in question as part of the cost of paving, by reason of which increased charge the assessments evidenced by the bills were alleged to be void. It will be observed that nowhere in the bill is it suggested or intimated that Wyandotte street or Main street had been previously covered with a rock macadam, which was the fact, or that the macadam was at the time the paving contract was enterprised in such condition that the action of the Board of Aldermen in ordering the roadway resurfaced with asphalt was unconscionable and confiscatory of property rights. In the proof relative to the condition of the surface of these streets, however, evidence which was directed to establish the fact that the streets were substantially at the established grade, so that no undue filling or excavation was required to enable the contractor to lay the street pavement at the established grade, it was developed that there was an old worn out macadam on Main street, so much worn out that the traffic from that street had been diverted to Wyandotte street (Transcript of Record, p. 402); and that Wyandotte street had been covered with an inferior macadam in 1892 (Transcript of Record, pp. 305, 389), more than five years before the asphalt pavement in question was laid on that street (Transcript of Record, pp. 305, 389); that the macadam was of an inferior quality (Transcript of Record, pp. 85, 283, 348); that the life of such macadam does not exceed eight years (Transcript of Record, p. 403); that the macadam on Wyandotte street had been worn down four or five inches (Transcript of Record, p. 402); that macadam was a discredited pavement and its use as a pavement for residence streets practically abandoned in both Kansas City and Westport; that in wet weather it was sloppy; and in dry weather the dust from it was annoying and destructive of household furniture and comfort (Transcript of Record, pp. 348, 283); that a majority of the owners of front feet of all the property on each one of these streets petitioned the municipal authorities of the city to have them repaved with asphalt; that the United States Circuit Court by its Receiver, Mr. Hugh Ward, had petitioned the municipal authorities likewise to pave these streets with asphalt (Transcript of Record, pp. 170, 146, 121); that by the unanimous vote of the Aldermen and approval of the Mayor the contracts had been entered into; that

neither complainant nor any person, whether a resident of the City of Westport or not, had submitted a single objection or word of remonstrance against the paving of either of the streets in question until the work had been satisfactorily done in full compliance with the terms of the contracts and specifications, and the guaranty thereof for a period of five years. Although the case was tried more than five years after the asphalt pavements in question were laid, the record contains no intimation that they were not at that time in a perfect and thoroughly satisfactory condition; and the proof shows that the pavements as laid will endure as substantial and desirable pavements for a term of ten years after the guaranty shall have expired.

EFFECTS OF THE PAVEMENTS:

Referring to asphalt pavements complainant testifying in his own behalf said: "Well, it is a good pavement." (Transcript of Record, p. 204.) His own witness, Mr. J. C. Tate, said: "I think Wyandotte street has been benefited considerably by the asphalt paving. Q. Wasn't it your belief that the value to be added to the unimproved property by making the improvement would be greater than the cost of the work? A. Yes, sir." (Transcript of Record, p. 95.)

One cannot read complainant's own testimony without being satisfied that the streets in question comprise one of the most choice residence localities in or about Kansas City. (Transcript of Record, pp. 205, 206.) Complainant himself conceded that fronting Wyandotte street along the distance improved there were fifty-two residences—more than on either of the other streets improved (Transcript of Record, p. 345)—and the testimony shows that the general improvement of that locality is remarkably rapid. (Transcript of Record, pp. 76, 77, 142, 266.) Every witness upon the stand who testified as to the pecuniary effect or value of the paving of these three streets, including Wyandotte street, gave it as his unqualified opinion that the adjacent lots were enhanced in value by reason of the construction of the pavement to the extent of about ten dollars a front foot, and more than the cost of the paving. Col. Phelps (Transcript, pp. 212, 215); Mr. Woods (Transcript of Record, p. 241); Mr. Crutcher (Transcript of Record, p. 258); Mr. Beedle (Transcript of Record, pp. 273, 274); Mr. Finlay (Transcript of Record, p. 288).

Mr. A. D. Beedle testified: "Q. You may state what the general effect on values in that vicinity has been of the improvement of these three streets as referred to in the pleadings? A. Why, the general effect in that locality has been to have the *very best*

residences erected there and occupied by the very best citizens of the city. Prior to the improvements we had very few of them and now we have them all along on Wyandotte, Baltimore and Main. * *

"I have known all that country for thirty years, Westport and the tract of ground between Westport and the city." (Transcript of Record, p. 274.)

It is true that upon these facts, about which there is indeed little or no controversy, the learned trial judge, Hon. Smith McPherson, of Red Oaks, Iowa, before whom the case was unexpectedly tried, held that because the municipal authorities of Westport ordained that Wyandotte street should be repaved with an asphalt pavement which was required to be laid on top of the macadam, using the old macadam as a base or foundation for the new surface (due allowance for the worth of the macadam base being made in the bidding for the work), their action in that respect was unreasonable and confiscatory of property rights and void, because, in his opinion, formed five years after the thing had been done, the improvement was not necessary. He declared the special tax bills issued in payment of the contract price of paving that street, the aggregate amount of the bills thereby affected being $31,908.00, to be void. He declined to impeach the bills issued in payment of the paving of Main street and Baltimore avenue. And because he denied complainant relief as to those two streets complainant has appealed; and because the court afforded complainant relief as to the special tax bills issued in payment of the Wyandotte street paving, and ordered those bills canceled and surrendered, the Paving Company has prosecuted its appeal in this cause.

ISSUES ON PAVING COMPANY'S APPEAL.

The issues raised by the appeal of the Barber Asphalt Paving Company, as indicated in its assignment of errors, are two, namely:

(1) The Circuit Court had no jurisdiction of the suit, because the matter in dispute is less than the sum or value of two thousand dollars.

(2) The Circuit Court erred in adjudging that the ordinance of the City of Westport, ordering an asphalt pavement to be laid upon Wyandotte street in that city, and the tax bills issued to the Paving Company in payment of the contract price of that work, were void on the ground that the asphalt pavement was unnecessary.

MOTION TO DISMISS PAVING COMPANY'S APPEAL.

In the case of Barber Asphalt Paving Company, appellant, vs. Richard H. Field, No. 202, the respondent, Richard H. Field, has heretofore filed a motion to dismiss the Paving Company's appeal for want of jurisdiction. The motion was submitted to this court upon printed briefs of the respective parties in support of, and against, the motion. Thereupon the court indicated that the motion would be held until the case was submitted upon the merits. For our suggestions against the motion we beg leave to refer, without further discussion of that subject, to the printed brief against the motion heretofore filed by us in behalf of the Barber Asphalt Paving Company.

ASSIGNMENT OF ERRORS.

The Barber Asphalt Paving Company specifies the errors relied upon in its appeal in case No. 202, of the Barber Asphalt Paving Company, appellant, vs. Richard H. Field, as follows:

I.

The appellant says the decree rendered and entered in this cause by the Circuit Court, insofar as it adjudged and decreed that said court had jurisdiction of this suit and that the amount in dispute is not less than two thousand dollars is erroneous and against the just rights of the appellant.

II.

The appellant says that the said decree, insofar as it adjudged and decreed that the resolution of the Board of Aldermen, the ordinance of the city of Westport, and the contract between the said city and the appellant for paving Wyandotte street in said city, and the special tax bills described in complainant's bill as having been issued to and held by the defendant for paving Wyandotte street in said city are null and void, is erroneous and against the just rights of the appellant.

A similar assignment of errors was made and filed by this appellant in the Circuit Court of the United States in and for the Western Division of the Western District of Missouri on December 18, 1902, immediately prior to the entering of the order allowing this appellant its appeal herein. (Transcript of Record, pp. 32 and 33.)

BRIEF.

I.

JURISDICTION.

The United States Circuit Court had no jurisdiction of this suit because the matter in dispute, exclusive of interests and costs, is less than two thousand dollars.

The facts pertinent to this contention are these: Complainant alleged in his bill that he was the owner of certain city lots, describing them, which lots will be referred to hereinafter as the lots to which complainant has the legal title, and an undivided one-half of certain other city lots, describing them, which lots will be referred to hereinafter as the lots in which complainant claims an equitable interest; and that the city of Westport had undertaken to assess each of these lots with a certain sum as a special tax to pay for paving the streets upon which the lots abutted; that such assessments were evidenced by special tax bills which were owned and held by the defendant. The amount of the assessment against each lot is stated in complainant's bill; from which it appears that the total assessment against the lots to which complainant has the legal title is Seventeen Hundred and Eighty-three Dollars, and the total assessment against the lots in which complainant claims an equitable interest is Fifteen Hundred and Eighty-three Dollars (Transcript of Record, pp. 1, 3). The bill does not allege that complainant has or that he ever had possession of this property. It does not specifically charge that complainant has any title legal or equitable to the lands, but is contented with the allegation that complainant is "*the owner* of the following described real estate," etc.

The defendant in its answer averred that the matter in dispute did not exceed, exclusive of interest and costs, the sum or value of two thousand dollars. It admitted the ownership by the complainant of the certain lots to which complainant has the legal title, and denied that complainant owned a one-half interest, or any interest, in the lots as to which complainant avers his ownership of a one-half interest. The answer averred: "This defendant states that the complainant herein has stated and alleged in his said bill of complaint that he owns one-half interest in the lots hereinbefore described for the sole purpose of making it appear upon the face of the bill that this court had jurisdiction of the cause of action therein stated." (Transcript of Record, p. 13.)

Complainant's own proof was conclusive that the title to the lots in which the complainant claimed an equitable interest was duly vested by good and sufficient deed, duly acknowledged and recorded in the office of the Recorder of Deeds for Jackson County, Missouri, in Annie Camp Field. (Transcript of Record, pp. 199, 200, 201.) He knew this fact at the time his bill was prepared and filed. This proof did not come as a surprise to complainant. It was what he had in contemplation to support the allegation of his bill.

Our position is, that this is a suit in equity grounded upon the jurisdiction of equity courts to quiet title; that under the established principles of that judicature such suits can be maintained only by persons holding the legal title to real estate; that complainant cannot add to the amount of the alleged assessment against the lots to which he claims the legal title the proportionate amount of the assessment which would fall to his asserted equitable interest in the lots, the legal title to which is vested in Annie Camp Field, of which fact he was conscious at the time of drafting his bill of complaint, and thereby expand the dimensions of the cloud obscuring his title to the extent required to give the Circuit Court of the United States jurisdiction; that the complainant along with the rest of us is presumed to know the law; and that the allegations of his bill, in respect to the ownership of the lots in which he claims an equitable interest, is, for the purpose of determining the amount involved, to be construed as a fictitious and colorable claim, which will be disregarded by the court in determining the question of jurisdiction.

The statute relative to jurisdiction provides: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States," etc. U. S. Comp. Sts., 1901, p. 508, Sec. 629.

The act excludes from the jurisdiction of Federal Courts all causes involving rights which are not capable of a reduction to valuation in money. *Elgin* v. *Marshall*, 106 U. S., 578; *First National Bank* v. *Hughes*, 106 U. S., 523. Such as divorce, *Coswell* v *Coswell*, 120 Ill., 377; and the contest of an election to remove a county seat, *Smith* v. *Adams*, 130 U. S., 167.

It is stated in *Hicks* v. *Knost*, 94 Fed., 627, by Thompson, D. J.: "It is the policy of Congress to require all controversies where the amount involved is less than two thousand dollars to be

determined in state courts, notwithstanding they may involve federal questions, or the parties be of diverse citizenship."

It has been ruled by Adams, D. J., in the case of *Wheless* v. *City of St. Louis*, 96 Fed., 865, that owners of separate lots could not by joining in a bill of equity having for its object the cancellation of special tax bills, add the sums assessed against their several lots as a special tax under the state statute in question in this suit, so as to bring up the amount in dispute (the amount assessed against no one lot being $2,000), to that required by statute to give the court jurisdiction.

Complainant's bill appeals solely to the general equitable jurisdiction of the court to remove a cloud upon the title to real estate. It is a well settled rule of equity that this jurisdiction can be invoked only by the person holding the legal title to the land constituting the subject matter of the suit. He must have the title to cloud before his title can be clouded.

In *Kennedy* v. *Elliott*, 85 Fed., 832, it is stated by Hanford, D. J.: "Besides the objection that the issues in the pleadings are too narrow, there is an additional obstacle in the way of obtaining equitable relief, independently of the statute; for the complainants have not acquired legal titles to the land which they claim. They show only executory contracts to purchase from the State of Washington, whereby the state has covenanted to convey to each a particular tract, in consideration of full payments of the purchase price in annual installments, with interest. And if there is a controversy between the states of Oregon and Washington as to the location of their common boundary (the arguments assume that there is such a controversy between the two states), then, while that controversy remains undetermined, there is such uncertainty as to the validity of any title which the complainants can acquire from the State of Washington as to preclude them from establishing their rights conformably to the rules of procedure in courts of equity. If their titles were complete, as they can be made by the issuance of patents pursuant to their contracts with the State of Washington, the complainants would still be barred from suing in equity, independently of the statute, by the rule which requires a plaintiff in a bill to quiet title to show by incontestable evidence that he has the legal title. 1 Pom. Eq. Jur., Secs. 252, 253; *Holland* v. *Challen*, 110 U. S., 15-26; *Frost* v. *Spitley*, 121 U. S., 552-558; *Whitehead* v. *Shattuck*, 138 U. S., 146-156; *Wehrman* v. *Conklin*, 155 U. S., 314-333."

In *Patrick* v. *Isenhart*, 20 Fed., 339, it is said by Foster, D. J.:

"It is evident from the bill that it makes a case relievable in equity, but not a case for removing a cloud from the title. It seems that in order to obtain that relief the complainant must have the legal and equitable title, as also the possession. 'Those only who have a clear, legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.' *Orton* v. *Smith,* 18 How., 265."

In *Morse* v. *South,* 80 Fed., 206, it is said by Barr, D. J.:

"The bill alleges that complainant and the heirs of J. W. South are tenants in common, and have a fee-simple title in the land in controversy, and the actual possession thereof. * * * The defendants, William Strong and the Marcum heirs and Duff, have answered, and have put in issue all of the material allegations of the bill, except that the commonwealth of Virginia patented to Thomas Franklin the 116,656 acres, as described in the bill. * * It will be seen that the issues thus made go to the title and the possession of the complainant, and also the claim of ownership by the defendants, based upon adverse possession. The complainant cannot maintain his action to remove a cloud upon his title and quiet possession on general principles of equity, without clear proof of both possession and the legal title in himself. It is said in *Frost* v. *Spitley,* 121 U. S., 556:

" 'Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. *Alexander* v. *Pendleton,* 8 Cranch, 462; *Peirsoll* v. *Elliott,* 6 Pet., 95; *Orton* v. *Smith,* 18 How., 263; *Crews* v. *Burcham,* 1 Black, 352; *Ward* v. *Chamberlain,* 2 Black, 430. As observed by Justice Grier, in *Orton* v. *Smith*: 'Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on title.' 18 How., 265. A person out of possession cannot maintain such a bill, whether his title is legal or equitable, or, if his title is legal, his remedy at law, by action of ejectment, is plain, adequate and complete, and, if his title is equitable, he must acquire the legal title, and then bring ejectment. *U. S.* v. *Wilson,* 118 U. S., 86; *Fussell* v. *Gregg,* 113 U. S., 550.'

"This is also the rule in Kentucky. In *Packard* v. *Valley Co.,* 8 S. W., 779, (96 Ky., 249), the court say: 'The general rule and one well settled in this state is that in order to maintain an action

quia timet the plaintiff must have both title and actual possession.' See *Armitage* v. *Wickliffe*, 12 B. Mon., 44; *Campbell* v. *Disney*, 93 Ky., 41."

In *Frost* v. *Spitley*, 121 U. S., 552, the syllabus reads: "Under the jurisdiction and practice in equity, independent of any statute, a bill to quiet title cannot be maintained without clear proof of both possession and legal title in the complaint."

And in the opinion of the court by Mr. Justice Gray, it is said: "At the time of the sale on execution of Frost's interest in the land, the legal title was, and it still remains, in Durant. Although Frost, under his agreement with Durant and the corporation, and the decree which he had recovered against them, had been entitled to a deed of the land upon the payment of a certain sum of money, he had not paid the money, nor had any deed been delivered to him; so that his title, either by virtue of the agreement and decree, or by virtue of his occupation of the land as a homestead, never was anything more than an equitable title. The sale on execution against him (if valid and effectual), and the deed of the marshal passed only his equitable title to Redick; Redick's payment to Durant of the money unpaid by Frost did not divest Durant of his legal title; and Redick's subsequent conveyance to Spitley could pass no greater right than Redick had. Spitley's title, therefore, at best is but equitable, and not legal; and Frost, and not Spitley, is in actual possession of the land.

"Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of the real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff."

In *Stanton* v. *Catron*, 8 New Mex., 369, the court, after referring to a number of cases, say: "Under these authorities it is clear that under the general jurisdiction in equity, independently of the statute, a bill to remove a cloud from and quiet a title to real estate could not be maintained without clear proof of legal title and possession in the plaintiff. * * * If it be the title to the land that is to be established and quieted, how is this to be done unless the plaintiff be required to assert and prove his title? If he has no title, what has he to quiet? Manifestly, nothing. How can he ask a court of equity to establish and quiet for him that which he has not, and to which he does not lay any claim or offer proof to establish? He should come into court asserting his title before the defendant should be required to establish his adverse

interest. He should establish this title as the foundation upon which a court of equity may construct a decree giving him the quiet and uninterrupted enjoyment of his estate. This we understand to be the settled rule in both federal and state courts under statutes of this character."

In *Holland* v. *Challen,* 110 U. S., 15, it is ruled in an opinion by Mr. Justice Field in a suit in equity to quiet title:

"Undoubtedly as a foundation for the relief sought the plaintiff must show that he has a legal title to the premises, and generally that title will be exhibited by conveyances or instruments of record, the construction and effect of which will probably rest with the court."

If Annie Camp Field were a party to this suit, complainant's prayer as to the lots, the legal title to which was vested in Annie Camp Field, would, under the allegations of this bill, be denied.

In *Von Drachenfels* v. *Doolittle,* 77 Cal., 295, the court say:

"The theory advanced for the appellant is that the wife took the title in trust, and should be decreed to convey to him. But we think this relief is entirely outside the case made by the complaint. The complaint alleges that the plaintiff is the owner, and that the defendants' claim is without right. The judgment asked for would be that the plaintiff is not the owner, and that the defendants' claim is not without right, but, on the contrary, is the legal title, and should be conveyed to the plaintiff. It is obvious that the plaintiff cannot have a judgment in direct contradiction of the material allegations of his complaint. If in any case an action to determine an adverse claim can be brought under our statute upon an equitable interest (which we doubt; see *Frost* v. *Spitley,* 121 U. S., 552), it cannot be brought against the holder of the legal title."

Nor can the complainant sustain his claim that he should be allowed to add the amount of the assessment which would ratably fall to the equitable interest he claims in certain lots to the amount of the assessment against the lots to which he has the legal title, and thereby increase the amount involved so as to confer jurisdiction upon the United States Circuit Court, because of the statute of Missouri relative to suits involving the title to real estate.

The statute of Missouri is as follows:

"Any person claiming any title, estate or interest in real property, whether the same be legal or equitable, certain or contingent, present or in reversion, or remainder, whether in possession or not, may institute an action against any person or persons having or claiming to have any title, estate or interest in such property,

whether in possession or not, to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interests of the parties severally in and to such real property." R. S. Mo., 1899, Sec. 650, Vol. 1, p. 261.

This is the only statute in Missouri relative to such suits, as its enactment is held to have repealed the former law. *Meriwether* v. *Love,* 167 Mo., 514.

That statute contemplates the institution of law actions as well as suits in equity.

While the distinction between suits at law and those in equity is abolished in Missouri the principles of the two systems of judicature are clearly recognized and enforced in that state.

In Missouri judicature, no more than in our Federal jurisprudence, will an appeal to equitable jurisdiction be allowed to remove a cloud from the title to personal property. *State ex rel.* v. *Wood,* 155 Mo., 425; *Indiana Mfg. Co.* v. *Koehne,* 188 U. S., 681.

In *Boston & M., etc., Co.* v. *Montana O. P. Co.,* 188 U. S., 626, in an opinion by Mr. Justice Peckham, it was ruled in regard to a suit in equity to quiet title:

"The contention that under the code of Montana a person not in possession may maintain an action to quiet title cannot prevail in a Federal Court." Citing *Whitehead* v. *Shattuck,* 138 U. S., 146.

This suit is one in equity in name and in essence, and is to be determined as such. The appeal to the chancellor is made on the ground that the complainant has a legal, salable title, upon which a cloud has been wrongfully cast by defendant, which interferes with his right to sell and convey that title and which depreciates the value of his property. The jurisdiction invoked in the Circuit Court was purely and solely equitable jurisdiction.

If the only issue be to determine whether the assessment in question is a valid assessment, the method of raising and trying that issue is specified in the law authorizing the issuance of the special tax bills. Payment of these tax bills cannot be enforced nor can the complainant's possession of his lands, if he has any, be disturbed until the holder of the tax bill shall first have instituted a common law action in a court of competent jurisdiction against the owners of each tract of land assessed, to recover judgment for the amount of the assessment and for its enforcement against the land. Such a suit is a law action, and every charge made by the complainant in his bill herein against the validity of the special assessment in question could be pleaded as a defense to a law action brought to enforce those bills. He claims that the law

under which they were issued is unconstitutional and void; that work was done by the contractor which was not called for by the contract and the price of such work unlawfully included in the amount of the assessment; that the proceedings of the municipal authorities of Westport in conjunction with the acts of the defendant constituted a violation of the anti-trust act and the commerce clause of the Constitution of the United States. All of these contentions could have been raised and determined in the law action brought in a state court to enforce the lien of the special assessment in question. In that action under the Constitution of the state (Mo. Const. Art. 2, Sec. 28), and under the laws of that state, the holder of the tax bills is entitled to a jury trial. R. S. Mo., 1899, Secs. 691 and 694. Those sections are as follows:

"Sec. 691. An issue of fact in an action for the recovery of money only, or specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered as hereinafter provided."

"Sec. 694. Where there are several causes of action united in a petition, or where there are several issues, and the court shall be of the opinion that all or any of them should be tried separately by the court or jury, it may, on the application of either party, direct separate trials, which may be had at the same or different terms of the court, as circumstances may require. In all cases where there are separate causes of action united as aforesaid, the court shall award separate costs against the unsuccessful party, unless for good cause it shall otherwise order. The judgment upon each separate finding shall await the trial of all the issues."

If complainant's bill, so far as the lots to which he has an equitable claim are concerned, is grounded on Section 650 of the General Statutes of Missouri, quoted above, it being a suit in equity, then it is one having for its object and purpose "to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interest of the parties severally in and to such real estate." Why does the prayer of the petition not conform to the statute? How can a court of chancery ascertain and determine, define and adjudge the title and estate of the complainant, Richard H. Field, in this property, when the legal title is confessedly vested in Annie Camp Field, who is not a party to the suit, and when an undivided one-half interest in certain of the lots, according to the proof and assertions of complainant, is claimed by one George H. Camp, who is not a party to the suit? Is the prayer that the right or interest of complainant, Richard H. Field, be ascertained and determined to be an equitable interest or a legal

title, or any title? Complainant's bill, as we have seen, does not allege the character of his title, or indeed, that he has any *title*. Was it within the contemplation of the General Assembly of Missouri in the enactment of this statute that demands or claims, or rights of action, could be split up after the fashion that is indicated by complainant's present attitude in regard to his bill being supported upon this statute?

In Missouri a suit to determine the validity of such an assessment as those now in question is expressly ruled not to be a suit involving the title to real estate. *Barber Asphalt Paving Company* v. *Hezel*, 138 Mo., 228.

If he has a right by instituting this action to bring a corporation of a foreign state into this jurisdiction upon his call to determine the validity of an assessment levied against a lot to which he holds no legal title, but at best only an equitable claim to an undivided interest in that lot, then each of the others having a similar interest in that lot may institute in chancery a several suit with the same end in view, while the Paving Company under the law authorizing the levying of the assessments in question would be required, in order to enforce its special tax bills, to institute a suit against all the persons holding the legal title to the lot in a court of competent jurisdiction. *Garrison* v. *Frazier*, 165 Mo., 40, l. c., 47.

The Missouri statute contemplates that actions sounding in equity, based upon it to ascertain, define and adjudge the title to real estate, should involve all parties in interest. There is no escape from the conclusion that all parties interested in this controversy must be joined in the suit at bar, which is in form as well as in substance a chancery suit. In Missouri the universal rule of equity jurisprudence is enforced that in suits in equity all parties interested in the controversy are necessary parties. *Sampson* v. *Mitchell*, 125 Mo., 217, 228; *Burke* v. *Flournoy*, 4 Mo., 116.

The tax bills in question are enforceable only in a court of competent jurisdiction; and the statute relative to their enforcement contemplates a law action in which all parties in interest must be joined if the lien be enforced. R. S. Mo., 1899, Sec. 5986. The record shows such a law action to be pending in the state courts. (Transcript of Record, p. 199.) Unless complainant have the legal title otherwise pure, otherwise salable by him, what measure of relief may equity afford him which would not be granted in the law action? Why does not the law action, required by the statute to be instituted to enforce these tax bills, afford him a plain, adequate and complete remedy so far as the lots in which he has but an equitable interest are concerned? He cannot sell and convey those lots; for the title is in another. His possession, if he has

any, cannot be disturbed till that law action is determined and its judgment enforced. He cannot be coerced into paying the tax until its validity has been established in a suit at law. The court in which that action is required to be brought has jurisdiction to protect and determine all rights invoked by complainant in this suit. If the law action to enforce the special tax bills affords him adequate relief as to the lots in which he has but an equitable interest, then the assessment against those lots should not be considered in determining the jurisdiction of the court in this cause. The Federal statute prescribes: "Suits in equity shall not be sustained in either of the courts of the United States in any case when a plain, adequate and complete remedy may be had at law." U. S. Comp. Stat., 1901, Sec. 723.

The complainant is without any legal title under this record to the lots standing in the name of Annie Camp Field. Upon the record made he has not even a lien against those lots. He claims, and his claim is supported only by parole evidence, a right in those lots, but his claim does not reach the dignity of a title. Annie Camp Field, in whom, it is conceded and is shown by the record, the fee simple title is vested, is not a party to this suit. She would not be estopped by a judgment in this cause from asserting in a suit between her and the Paving Company what the records of the Recorder of Deeds of Jackson County show to be a fact, namely, that she is the absolute owner of the real estate referred to. George H. Camp, whom complainant's proof shows has an equitable claim similar to his own to these lots, would not be estopped in a suit similar to this between himself and the Paving Company by the adjudication of this cause. The ancient principles and practices in equity and law courts abhor the multiplying of litigation and the splitting of demands or causes of action.

The Circuit Court being without jurisdiction because the amount in controversy in this suit does not exceed the value of two thousand dollars, its judgment should be reversed and complainant's bill dismissed.

II.

THE DECREE CANCELLING WYANDOTTE STREET BILLS IS ERRONEOUS.

That part of the decree of the Circuit Court adjudging the ordinance to pave Wyandotte street with an asphalt pavement, and the tax bills issued in payment of that work, to be void on the

ground that the asphalt pavement was unnecessary and the ordinance ordering it unreasonable and void, because five years previously the same street had been macadamized, is not responsive to any issue raised upon the pleadings and is contrary to the rights and equities of the Paving Company.

(a) No issue as to the unreasonableness, or *ultra vires* of the ordinance to pave Wyandotte street with asphalt, or indeed of any of the three ordinances to which the language of complainant's bill equally applies, is raised by the pleadings in this suit.

The bill of complaint in this cause originally contained twelve charges or paragraphs; and it was somewhat lengthened by amendments. Each charge was directed to three separate streets, so it becomes apparent that there were thirty-six charges in the bill.

The only language in this bill which by stretch of latitude can be claimed to charge that the action of the Council in ordering the work done, and contracting for it, was unreasonable and without the sphere of its legislative authority, is contained in the sixth charge. The gravamen of that charge is the accusation that the defendant circulated among the resident property owners a petition for this work, and induced them to sign it by wicked and unlawful promises and considerations, and by such petition caused the work to be ordered by the municipal authorities. And as an argument to enforce that position, and as a side-coloring to make the enormity of the charge more apparent, this language is used as a part of a sentence and not as an independent allegation, "and the order for the work aforesaid upon each of the three streets aforesaid was in each case not due to any necessity therefor, or because the said Board of Aldermen deemed the same or either of them necessary to be done, but because of the lobbying," etc.

Now, let us eliminate the words "or because said Board of Aldermen deemed the same or either of them necessary to be done," because the resolution and ordinance of the Aldermen are in evidence on the part of the complainant, and the uniform holding of all courts is that the express enactments of legislative bodies are the evidence, and sole evidence, of the intention of such bodies. That is, that a legislature must be taken to mean what it says it means.

In *City of Kansas* v. *Richards*, 34 Mo. App., 521, 531, it is said:

"The passage and promulgation of said ordinance, providing for the establishment of said sewer district and the construction of the sewer therein, furnishes indubitable evidence that the common

council of said city deemed said sewer necessary for sanitary and other purposes."

We have, then, as the only allegation of the bill tending to raise this issue these words which are in the middle of a sentence charging corruption; the order for the work "was in each case not due to any necessity therefor, * * * *but* because of the lobbying," etc.

The language of the entire charge of complainant's bill in this respect is as follows:

"Sixth. For the purpose of forestalling any remonstrance from the residents of the City of Westport owning property fronting on such pavements, before any plans or specifications for them or either of them were made and filed in said City of Westport, and before any resolution or ordinance ordering such streets or either of them to be paved were passed, the defendant circulated among such residents a petition in each case asking the Board of Aldermen of said City of Westport to cause such work to be done, and induced the said residents of said late City of Westport to sign said petition and to refrain from remonstrating against such improvements by promises of rebates on the amount of tax bills to be issued against their property for said improvements, and by other favors to such residents upon the costs of such work, and thereupon defendant caused to be drawn plans and specifications, resolutions and ordinances for the work, which were adopted by the Board of Aldermen of said City of Westport, and the order for the work aforesaid, upon each of the three streets aforesaid, was in each case not due to any necessity therefor, or because the said Board of Aldermen deemed the same, or either of them necessary to be done, but because of the lobbying and conduct aforesaid of the agents and servants of the defendant owners, and because of their lobbying with the Board of Aldermen of the City of Westport, and the defendant's undue and illegal influence over the Board of Aldermen of said City of Westport." (Transcript of Record, pp. 3, 4.)

The charge that a street pavement is not necessary is certainly not a charge that the ordinance authorizing it is unreasonable, or that the legislative authorities exceeded their authority in enacting it.

This is a Missouri case. It involves the construction of Missouri's laws, the enforcement of her policies. In construing pleadings, at least, counsel for defendant have the *right* to rely upon the schooling of the state courts as to state policies and state laws affecting local affairs.

We have in this bill the charge that the municipal action was the product of the corrupt practice of the agents of the defendant rather than necessity. Viewing the allegation from complainant's standpoint, to say that the charge is that this asphalt pavement was not "necessary to be done," is putting this charge in the strongest possible light justified by this bill. Our contention is that this allegation does not raise an issue of the *ultra vires* of the ordinance, its constitutionality, or its unreasonableness; that no proof was adduced by defendant below upon any such issue, and that the learned chancellor went out of the record to determine it.

In *Seibert* v. *Tiffany*, 8 Mo. App., 33, 37, the court said:

"The passage of the ordinance is conclusive as to the *necessity* of the work."

In *Bohle's Admr.* v. *Stannard*, 7 Mo. App., 51, 55, the court said:

"This work was ordered in the exercise of a discretion committed to the city legislature, which discretion we have no power to revise. Nor have we anything to do with the reasons, or alleged reasons, for the legislative action. The ordinance directing the work settled the question that the exigency contemplated by statute had arisen."

In *Mining Co.* v. *City of Joplin*, 124 Mo., 129, 138, our Supreme Court, in an opinion by Presiding Judge Black, said:

"It is for the city council to determine the question whether the public welfare requires or makes the sewer *necessary* or expedient. With that question the courts have nothing to do, for the law has confided it to the judgment of the city council."

In *Skinker* v. *Heman*, 148 Mo., 349, 355, the court said:

"The power to grade and improve its streets is a legislative power, and is a continuing one, unless there is some special restraint imposed in the charter of the corporation. It may be exercised from time to time as the wants of the corporation may require, and of *the necessity* and expediency of its exercise *the governing body of the corporation, and not the courts, is the judge.*"

It is unquestionably established practice in Missouri, as shown by these authorities, that the sole charge that municipal work is not necessary when that work has been ordered by ordinance in due form, does not state a cause of action and does not put respondent on proof as to any issue. We invoke the protection, the security of this law. The course of this trial shows clearly that we have relied upon it. No evidence was introduced by defendant relative to the necessity for the improvement, or as to the condition of the old macadam, except such as was elicited relative to the issue as

to whether the roadway of these streets immediately prior to the laying of the pavements were approximately on grade.

The record discloses that the heroic exertions of the complainant were directed to show that the surface of each of these three streets was *off* of the grade; that they were so worn or washed that work beyond that required by the specifications had to be done, which added an additional and unlawful charge to the property owner, and it was in taking proof along this line of his aggression that certain expressions have been dropped from the lips of witnesses tending to show that the old macadam road on Wyandotte street was in the condition described; that is, that it was not worn more than four or five inches down, as one witness puts it, and that it was muddy, or dusty, at intervals. But neither complainant nor the defendant put a witness upon the stand to testify in detail as to the exact condition, or durability of that macadam road, or its adaptability to first class residence conditions.

The complainant asserted his contention to be that the surface of these streets, including Wyandotte street, before the asphalt pavement was laid, was not substantially upon the established grade, and that the Paving Company by bringing the streets to the established grade preparatory to laying the asphalt pavement, did work not provided for in the contract, the price of which was unlawfully included in the assessment evidenced by the special tax bills in suit. The Paving Company by proof sought to rebut this contention by evidence tending to prove that when it began the work the surface of all three streets were substantially upon the established grade.

Defendant's witness, A. M. Stalnaker, a civil engineer, and former city engineer of Westport, testified that each of the three streets at the time the asphalt pavement was commenced was substantially on the established grade. He was being cross examined by the complainant; and the witness in endeavoring to define what he meant by "substantially upon the established grade," said: "Well, in the first place let us suppose the street *is* on the established grade and consider what the contractor has to do. Q. (By complainant.) I cannot accept your supposition, *because it is not in this case.* What I mean is, what do you mean by practically at grade, how many inches might it vary? A. I mean, I consider a street practically at grade if the contractor does not have to do more work to prepare the subgrade than if he found the street on the established grade—absolutely on the established grade." (Transcript of Record, p. 398.)

To allow the complainant to occupy an attitude of duplicity before the court, to permit him by cunning and artifice to mislead

his adversary, to prostrate the truth, to outwit the court, and by such wiles to obtain something for nothing, is not to glorify the precious principle and foundation of our constitutional and common law defined by the phrase: No person shall be deprived of his property except by due process of law.

(b) In the City of Westport, acting in its legislative capacity, and not in the courts, was vested by the sovereign State of Missouri the authority and power to determine the necessity, expediency and the time when, and the material with which, its streets should be paved.

The charters of such cities, being a general law of the State of Missouri, confer powers upon such cities in this language:

"The cities coming under the provisions of this article in their corporate capacities are authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by law: * * * Second. To open and improve streets, avenues, alleys and other highways, and to make sidewalks and build bridges, culverts, drains and sewers within the city, and to establish grades for all improvements herein mentioned. Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city." R. S. Mo., 1899, Vol. 2, Sec. 5979.

"When the Board of Aldermen shall deem it necessary to pave, macadamize, gutter, curb (when such curbing is set out into the street beyond the sidewalk), or otherwise improve any street, avenue, alley, or other highway, or any part thereof, within the limits of the city, for which a special tax is to be levied as herein provided, the Board of Aldermen shall, by resolution, declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvements, then the Board of Aldermen shall have the power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided; and the finding of the board that a majority of such owners have not filed protest shall be conclusive and final." R. S. Mo., 1899, Sec. 5989.

"The Board of Aldermen shall have power to create, open and improve any public square, public park, street, avenue, alley or other highway, old or new, and also to vacate or discontinue the same whenever deemed necessary or expedient." R. S. Mo., 1899, Sec. 5990.

The exercise of such powers by municipalities is held in Missouri to be purely a legislative function, the exercise of legislative power. *Keating* v. *City of Kansas*, 84 Mo., 415, 419; *Wheeler* v. *City of Poplar Bluff*, 149 Mo., 36, 47; Dillon Mun. Corp., 3 Ed., Vol. 2, Secs. 949, 951.

The power to pave is held in Missouri to include the power to repave. Whether macadam is to be dignified by being classed as a street pavement, though this statute just quoted seems to distinguish them, is therefore immaterial.

In *McCormack, Admr.*, v. *Patchin*, 53 Mo., 33, 36, 37, it is said:

"The power to grade and improve streets is a legislative power, and is a continuing one, unless there is some special restraint imposed in the charter of the corporation. * * * As the power to tax and the power to make local improvements at the expense of the property benefited is, like all the other legislative powers of the municipality, a continuing one, unless there be something to indicate the contrary, it follows that the power to compel the property owners to pave generally extends to compelling them to repave when required by the municipal authorities."

Dillon's Mun. Corp., 3d Ed., Vol. 2, Sec. 686, states the rule as follows:

"That the power to grade and improve streets, like other legislative powers, is a continuing one, unless the contrary is indicated, has been frequently decided in both the national and state courts. It may, therefore, be exercised from time to time, as the wants of the municipal corporation may require. *Of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, are the judges.*"

Mr. Elliott, in his work on Roads and Streets, page 335, has said in regard to the power of municipalities to improve their streets:

"This power is a continuing one and is not exhausted by being once exercised. The exercise of the power rests largely in the discretion of the municipal authorities and they, and not the courts, must judge of *the necessity* or expediency thereof."

In *The City of Kansas* v. *Richards*, 34 Mo. App., 521, 533, it is said:

"With the question of the unreasonableness or oppressiveness of a city ordinance passed in strict pursuance of an express grant of authority from the legislature, the courts have nothing to do. *The City of St. Louis* v. *Henrichs*, 6 Mo. App. 591."

In *Wabash R. Co.* v. *Defiance*, 167 U. S., 88, the validity of an ordinance of the respondent city changing the grade of a street at a railroad crossing from an overhead crossing to a crossing at

grade was challenged upon grounds quite similar to those urged against the street improvement ordinance in the case at bar. In the opinion by Mr. Justice Brown it is said:

"Indeed, the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants. * * * The ordinances of February 7, 1893, were not beyond the powers of the common council with respect to the improvement of streets. While, in 1887, overhead bridges might have seemed a better and safer plan of crossing the railway than crossing at grade, the subsequent growth of the city may have demanded a different policy in 1893. * * * But, however this may be, *we are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised;* or what the motives were for making the change; or whether the crossing so improved was burdensome to the railroad company; or made unsafe to persons crossing the track. These were considerations which might properly be urged upon the common council as arguments against the proposed change; but *it is beyond the province of the courts either to praise the wisdom, or criticise the unwisdom of such action.* The question before us is simply whether the council had the power to make the change, and of this we have no doubt."

In the case of *Skinker* v. *Heman,* 148 Mo., 349, it was sought by the plaintiff to enjoin the issuance of a special tax bill against his land for laying a stone sidewalk in front of it at a cost to him of three hundred dollars. The gravamen of his complaint was that the ordinance and proceedings authorizing the work were unreasonable and void because he had a good brick sidewalk already in place that could have been put in repair for seven dollars. The court at page 355, said:

"The power to grade and improve its streets is a legislative power and is a continuing one, unless there is some special restraint imposed in the charter of the corporation. It may be exercised from time to time as the wants of the corporation may require, and of the necessity and expediency of its exercise the governing body of the corporation, and not the courts, is the judge. * * *

"It is contended that as in the application of this ordinance to the plaintiff's property in front of which he has a brick pavement, confessedly out of repair, he would be required to expend $300 for replacing it with a stone pavement as required by the ordinance, when he could repair it with brick so as to make a very good pavement, at a cost of $7, the ordinance, as to him, is unrea-

sonable and oppressive, and as to him ought to be declared void, and the enforcement of the tax bills therefor ought to be enjoined, and for support of his contention he relies upon the case of *Corrigan* v. *Gage*, 68 Mo., 541, in which the charter power was substantially the same as in the case in hand, and in which we held that an ordinance requiring the 'paving of a sidewalk in an uninhabited portion of a city, and totally disconnected with any other street or sidewalk,' was unreasonable and oppressive, and refused to sustain it. That ordinance imposed a burden upon the adjoining property owners without any corresponding benefit to them or to the public; was wholly uncalled for by the conditions to which it was to be applied, appeared to be the offspring of mere legislative caprice and furnishes an apt illustration of that arbitrary abuse of municipal legislative power, for relief against which the power of the courts may be invoked. * * *

"The fact that in its application to the plaintiff's property, he will be required in the interest of the public for whose benefit it was enacted to lay down a stone pavement in front of his premises at a cost of $300, and which, for aught that appears to the contrary, may benefit his property to a reasonable extent, when he could have repaired his old brick pavement with brick at a cost of $7, furnishes no ground whatever for impeaching the validity of the ordinance."

In *Heman* v. *King*, 85 Mo. App., 231, 233, 235, it is said:

"The legal question presented by the record is, may the defendant, when sued on a special tax bill for reconstruction of a sidewalk or street on which his property abuts, defeat a recovery on the sole ground that the sidewalk or street was not out of repair, and that *the reconstruction was unnecessary*. In *Warren* v. *The Barber Pav. Co.*, 115 Mo., loc. cit., 580, Judge Macfarlane, speaking for the court, used the following language: 'In the performance of duties in which discretion is lodged with the governing authorities of a city, we think objections to the methods adopted by them, which are within such discretion, should be made before the work is done, unless fraud or collusion is shown. It would be unjust to a contractor who has completed an improvement in full compliance with a contract awarded him by the Board of Aldermen, which is within the general powers conferred upon it, to refuse payment for the simple reason that the courts may conclude that the means or methods adopted by the board were not the best or cheapest. If contracts could be vacated for such reasons, all security to contractors would be destroyed and the cost of improvements necessarily increased in order to insure against such contingencies.' Citing *Sheehan* v. *Owen*, 82 Mo., 464; *Ross* v. *Stackhouse*, 114 Ind., 200; *Cole* v. *Skrainka*, 105 Mo., 309; *Gibson*

v. *Owens,* 115 Mo., 258; *Morse* v. *Westport,* 110 Mo., 502; *Johnson* v. *Duer,* 115 Mo., 366. * * *

"To permit the defense in such cases, as was allowed on the trial of this cause, (that the improvement was not needed) would be intolerable, harassing and extremely detrimental to both the city and the real estate owners. In the language of Judge Macfarlane, in *Warren* v. *Barber Paving Co., supra,* if such defenses could be interposed 'all security to the contractors would be destroyed, and the costs of improvements necessarily increased in order to insure against such contingencies.' The contractor for these improvements contracted with the city, and is bound, when notified by the proper officer, to make them; he has no voice in the making of the ordinances providing for the improvements, nor is he to judge of the applicability of the ordinance to any particular sidewalk; his duty is to comply with his contract and make the improvement when notified, in the manner and with the material provided for by the ordinance, and it seems to us that *unless the ordinance under which the work is done is wholly void on its face, or is the product of collusion or fraud, the owner* of the real estate against which the special tax bill is issued *should be estopped to defend on the ground that the improvement was unnecessary.* * * * If they erred in their judgment by applying the ordinance to respondent's property, it was not the error of the contractor, and he should not be made to suffer for their mistake, nor should he, after having performed the work, be compelled to defend the correctness of their judgment in a suit on his special tax bills issued for the contract price of the work."

(c) The indisputable facts disclosed by this record clearly establish that the powers of the legislative authorities of the City of Westport in the enactment of the ordinance to pave Wyandotte street, and indeed in the enactment of each of the improvement ordinances now in contest, were exercised within the bounds of reason and apparent necessity.

The facts may be briefly summarized as, (1) the asphalt pavement was laid in the fall of 1897 and was *guaranteed* to remain in perfect repair for a period of five years after completion (Transcript of Record, p. 174); and it is not disputed that at the time of the trial, it was in excellent condition, doing service as a first-class street pavement; (2) that a majority of resident owners of lots abutting upon the part of the street to be improved had petitioned the city officials to have the same paved with asphalt at the time and in the manner ordered by those officials, although the con-

struction of the improvement as petitioned for imposed the obligation upon such petitioners to pay the same relative proportion of the entire cost of the work that complainant was required to pay. The petitioning property owners owning property on Wyandotte street were twenty-two in number and included Col. Charles F. Morse, Mr. Charles J. Hubbard, Mr. T. H. Mastin, Mr. R. H. Keith, president of the Central Coal & Coke Company, Mr. A. E. Stilwell, a railroad president, Mr. George W. Lee, Mr. A. J. McDonald, Mr. W. A. Rule, cashier of the National Bank of Commerce, and many others (Transcript of Record, pp. 169, 170). These expressed their judgment, and the learned trial court held it was a pure and unbought judgment, that this pavement was expedient and necessary and worth more than its price; (3) the United States Circuit Court, by causing the petition for this work to be signed by its receiver, in the case of *Mastin* v. *Mastin*, Mr. Hugh C. Ward (Transcript of Record, p. 170) expressed the favorable judgment of the court upon the improvement; (4) all the members of the Board of Aldermen and the Mayor of the City of Westport concurred in ordering this improvement; (5) no property owner along the entire street, although due notice by publication had been given of the intention to improve it at the expense of the property owners—not even the complainant—protested or attempted to protest against the work; (6) the macadam on Wyandotte street had been in service for five years; it was worn down three or four inches; in dry weather there arose from it a dust detrimental to household furniture and the health of residents along it, and in wet weather it was muddy. The Supreme Court of Missouri have said in reference to such a pavement: "It would be hard to suggest a cheaper or more primitive effort to put the street into condition for use as a thoroughfare." *Morse* v. *Westport*, 136 Mo. l. c., 284; (7) an adequate allowance was made in the bid for relaying the asphalt for the value of the old macadam then in place, which was to be used as a base of the asphalt pavement; (8) every witness who was called to testify with regard to the benefit sustained by abutting property by reason of this pavement (this testimony was introduced by the defendant paving company upon the issue raised by complainant's bill as originally drafted, to the effect that the charter law of the city of Westport was void, because, without regard to benefit, it required the cost of the pavement to be assessed and charged against abutting lands in proportion to their frontage upon the improvement,) testified that the pavement of the street complained of here increased the value of complainant's property on Wyandotte street about ten dollars per front foot; and there is no proof to the contrary.

It has been ruled by the Supreme Court of Missouri in a case where the issue of the unreasonableness and the arbitrary character of an ordinance to pave a street in the City of Westport was directly raised by the pleadings, and one in which the attack was made before the work was done, that the ordinance was not amenable to the charge, although the facts in judgment were more favorable to that contention than those disclosed by this record, *Morse* v. *City of Westport,* 110 Mo., 502. The opinion is by Sherwood, P. J. (the same judge who wrote the opinion in *Corrigan* v. *Gage,* 68 Mo., 541). In the opinion it is said:

"But whether the city, though having general authority to construct, build, make or pave streets in the manner indicated, had any authority to do so in this particular instance is brought into question by the plaintiff upon the ground that the ordinance is unreasonable. On this point it may be observed that the authorities of a city are invested with a large discretion in determining the necessity or expediency of ordinances they shall adopt; and when those powers are exercised within the bounds of reason and apparent necessity they should not be held null by the courts. * * * When the courts are called upon to exercise judicial power in declaring a municipal ordinance unreasonable, they will make such declaration only when the *prima facie* case made by the passage of the ordinance is overcome in the most satisfactory manner." Citing, *State* v. *Inhabitants,* 53 N. J., 132.

In *Morse* v. *Westport,* 136 Mo., 276, another ordinance of the City of Westport authorizing the improvement of a street was declared to be within the bounds of reason and apparent necessity. Macfarlane, J., in his dissenting opinion on page 286 concedes the law to be as follows:

"No proposition of law is better settled in this state, or receives more general recognition in the courts of this country, than that in determining *what street improvements shall be made,* and what property will be benefited thereby, in fixing benefit districts and apportioning the tax throughout the district, the discretion of the municipal legislative authorities is conclusive upon the courts. Where legislative powers are delegated to a municipal corporation, its discretion within the legitimate sphere of its authority is proportionately as wise as is a like discretion possessed by the legislature of the state, 'and as free from outside interference, and that discretion is not subject to judicial revision or reversal.' *State ex rel.* v. *Schweickardt,* 109 Mo., 511, and cases cited. * * *

"It is true that the whole theory of local assessments is that the improvements for which they are levied affords remuneration to the property owner in the way of benefits, and to go beyond the limit of

compensation in making assessments would be to exceed the power of taxation; yet the honest legislative action of the council raises a conclusive presumption that the benefits received from the improvements will equal the charge imposed. The law presumes that the council has made careful investigation before it acted. To say that the courts have the right of review would substitute their discretion for that of the legislature, and would practically deprive the city of the legislative powers conferred upon it."

(d) Complainant should not now be heard to say the tax bills for paving Wyandotte street are void on the ground that the ordinance authorizing the work was unreasonable or the work unnecessary.

In neither his pleadings nor his proof has he asserted or established the fact that he did not have full knowledge, that this improvement had been by ordinance of the City of Westport directed to be made and had been contracted for, before the contractor entered upon the execution of the work and that he was not then aware of all the facts which he now urges in support of the assertion that the asphalt pavement was unnecessary. He knew that the Paving Company in all that it did was relying upon the contract whose terms and method of execution conformed to law, and he did not notify it or its representatives before, or during the progress of the work, that he would contest the validity of the contract or of the assessment levied to pay the contract price on that ground. It is true the evidence tends to show that after the work was done he made some vague threats to contest the validity of the special tax bills in question as a justification for a demand for a reduction in the amount to be paid by him upon this assessment. (Transcript of Record, p. 199.)

In fact he stood by while the Paving Company expended its wealth in constructing a permanent and valuable pavement upon the street in front of his lands which materially increased their value. He now has and enjoys in the increased value of his property the benefit conferred by that improvement. He did not raise this issue of the necessity of the work by formal notice, or by suit to declare the municipal ordinance void or to restrain the execution of the work before it was done. He knew that the ordinance authorizing the work was fair and valid upon its face, and that the city of Westport in executing a contract with the Paving Company pursuant to the requirements of that ordinance was in a sense his representative and agent.

Judge Dillon in his work on Municipal Corporations, Vol. 2, Sec. 810, (3rd Ed.), has said: "But although the property owners are not privies or parties to such contract, yet to a certain extent and in a substantial sense, the municipality is their agent."

Such is the rule in Missouri. In the recent case of *Hilgert* v. *Barber Asphalt Paving Co.*, in the Kansas City Court of Appeals, which was decided during the pending term and is not yet reported, it is said by the court in referring to the attitude of a complainant who sought to have certain tax bills against her lands adjudged void: "The improvement was one that *her agent*, the city, was duly authorized by its charter to have made."

The complainant remained silent and inactive while this improvement was being authorized and contracted for by the municipal authorities, and while defendant was expending its labor and material in constructing a public thoroughfare and was thereby enhancing the value of his lands. The courts were then open; and he could have then raised and had determined the issue as to whether the ordinance ordering the work was void on the ground that the work was not necessary. Two years and more after the work was completed he approaches the sacred precincts of a court of conscience with his arms loaded with the products of another's expenditure. His petition is for the removal of a cloud upon his title caused by an assessment of benefits against his lands arising from a public improvement; to grant it is to deprive the builder of that improvement of all compensation for his work and to give the supplicant something for nothing. If he had promptly exposed the alleged secret infirmity of the ordinance ordering the work a loss to the contractor would have been avoided and he would have escaped the accusation of having, by silence, come into the enjoyment of the property of another without paying for it. Such an attitude and such conduct shock the conscience. It is contrary to the common principles of justice. He who comes into equity must come with clean hands. He who seeks equity must do equity. Those alone are welcomed to the precincts of equity who come in the spirit of equity.

The case last referred to of *Hilgert* v. *Barber Asphalt Paving Company*, recently decided by the Kansas City Court of Appeals, and not yet reported, was one brought by Josephine Hilgert, appealing to the equity jurisdiction of the court, to cancel certain tax bills as clouds upon her real estate. The principal contention was that the contract required the work to be completed on or before a certain date, and in that respect the contract had not been performed. The court in an unanimous opinion by Presiding Justice Smith, said: "The improvement was one that her agent, the city, was duly authorized by its charter to have made, and it was completed by

defendant according to the special ordinances, and the contract work was accepted by the city. And for aught that appears she stood by and saw the defendant expend its material and labor and money in making same without protest or objection; but when it was completed, when she had received all the benefits which could result to her lots from so substantial an improvement, she then, for the first time, objected and invoked the interposition of a court of equity to relieve her property from being burdened with its proportion of the cost of such improvement. It does not appear that the delay in the completion of the improvement was unreasonable or that plaintiff suffered any injury in consequence of it, and I think she has not shown herself entitled to equitable relief."

In *Heman* v. *King*, 85 Mo. App., 231, it is said: "The contractor for these improvements contracted with the city, and is bound, when notified by the proper officer, to make them; he has no voice in the making of the ordinances providing for the improvements, nor is he the judge of the applicability of the ordinance to any particular sidewalk; his duty is to comply with his contract and make the improvement when notified, in the manner and with the material provided for by the ordinances, and it seems to us that unless the ordinance under which the work is done is wholly void on its face, or is the product of collusion or fraud, the owner of the real estate against which the special tax bill is issued should be estopped to defendant on the ground that the improvement was unnecessary.

"That issue (the applicability of the ordinance to respondent's property), should have been tested *before* the work was done by an appropriate proceeding between respondents and the city or its street commissioner. Respondents having failed to do this, have lost their day in court, and are estopped to raise it against the contractor in a suit on the special tax bill."

In *Huling* v. *Bandera Flagstone Co.*, 87 Mo. App. l. c., 360, the opinion of the court by Presiding Justice Smith, uses this language: "An examination of the various contentions made by the plaintiff has not impressed us with the conviction that he is entitled to any equitable relief. He knew the ordinance providing for the construction of the sidewalks had been passed, yet he stood still and did not move until he saw the contract let and the work completed thereunder—until his property had, without any expense to him, received the full benefit resulting from the street improvement. Under these circumstances little heed should be given to his complaint."

In *Gill* v. *United States*, 160 U. S., 426, the claim of an employe against the United States for compensation for the use by the government of inventions made by him while in the employ of the

government was under consideration. In stating the underlying propositions, the court, in the opinion by Mr. Justice Brown, said: "The principle is really an application or outgrowth of the law of estoppel *in pais* by which a person looking on and assenting to that which he has the power to prevent is held to be precluded forever afterwards from maintaining an action for damages. A similar instance is that of one who stands by while a sale is being made of property in which he has an interest and makes no claim thereto, in which case he is held to be estopped from setting up such claim."

If the contractor is defeated in enforcing the lien of this assessment upon abutting lands he cannot recover the contract price, or any compensation for the materials and labor expended in the construction of this street. *Keating* v. *Kansas City*, 84 Mo., 415, *Saxton* v. *St. Joseph*, 60 Mo., 153.

In *Shehan* v. *Owen*, 82 Mo., 454, the court said: "The work has been done by the plaintiff. No complaint is made that it was not done according to the contract, or that plaintiff is in any manner charged with notice of alleged irregularities in the proceedings of the council or the acts of the city officials; and while there may have been irregularities, the ordinances were substantially complied with by the city authorities and nothing done, or omitted, which could possibly have affected injuriously the interests of the defendant or other property holders, and we are not inclined to turn a plaintiff out of court who has given his time and expended his money in the improvement of their property on mere technicalities which in no manner affect the substantial rights or interests of the parties."

III.

NO CORRUPT PRACTICES.

There is no merit in the complainant's charges that the petitions for the work, in payment of the price of which the special tax bills in controversy were issued, were procured by promises of rebates, or that the ordinances ordering the work were enacted because of the lobbying of the defendant.

(a) There is no proof—not even a scintilla—that there were any unlawful practices on the part of the defendant in connection with the improvement proceeding in question.

And such was the holding of the Chancellor. In his Findings it is said: "I have searched the record and find no evidence of corruption. * * * I fail to find evidence that there was any sharing of profits with any of the aldermen, or of receiving by, or offering rebates to, any of the property owners." (Transcript of Record, p. 519.)

(b) The allegations in complainant's bill in respect to lobbying or fraud are not sufficiently definite to constitute a cause of action, or to require defendant to plead and make proof thereto.

In *Nagel* v. *Lindell R. R.*, 167 Mo., 89, in an unanimous opinion of the court it is said: "A mere charge of fraud, without specification of the act or acts which constitute the alleged fraud, amounts to nothing in pleading, and would be stricken out on motion. We have said this so often that it would seem useless to cite authorities to support it. *Bank* v. *Rohrer*, 138 Mo., 369; *Goodson* v. *Goodson*, 140 Mo., 206; *Burnham* v. *Boyd*, 167 Mo., 185; *Wood* v. *Carpenter*, 166 Mo., 465; 9 *Enc. Pldg.* & *Prac.*, p. 683. The petition charges that the municipal assembly was corrupted by bribery, but does not state who was the briber nor who the bribed. There are three corporations involved, two of which, according to the petition, acquired their interests after the franchise had been granted. Whether it is intended to include them in the charge is not clear. 'Their agents, servants, and attorneys' designates a large and unknown class. 'The aldermen, councilmen and members of the municipal assembly' covers a large number of officials in general, but points to no one in particular. Paying or promising to pay 'stocks, bonds, privileges and large sums of money to vote for said pretended franchise and ordinance' is as vague and uncertain as language could make the charge. There is no statement as of a fact which could be traversed; there is no issue tendered. A demurrer admits only facts well pleaded. It does not admit a mere characterization, which is all there is of the charge of fraud in this petition."

To the same effect is *Nichols* v. *Stevens*, 123 Mo. l. c., 117. "That it is necessary to set forth in a petition the facts constituting the fraud pleaded, no one has ever doubted or denied. Logical and legal consistency, therefore, require that an answer should as necessarily state the constitutive facts of the fraud relied on, as that a petition should do so. This is the view taken by Judge Bliss in his work on pleading, where he says: 'In alleging fraud it will not suffice to say that the party fraudulently procured, or fraudulently induced, or fraudulently did this or that, or that he com-

mitted or was guilty of fraud; the facts which constitute the fraud must be stated.'"

IV.

MISSOURI STATUTE CONSTITUTIONAL.

The constitutionality of the general law of Missouri relative to cities of the fourth class in respect to improving streets, Secs. 5982 to 5989, Vol.,2, R. S. Mo., 1899, can not be successfully challenged on the ground of depriving a person of property without due process of law, or of not affording non-residents of the city the equal protection of the laws.

(a) If this contention grows out of the fact that the assessments are levied on abutting property according to the frontage, it will avail plaintiff nothing on the showing made by this record, in which the unchallenged testimony proves that each lot headed in on the street improved, and that the value of each lot was increased by reason of the improvement in an amount exceeding the cost of the improvement; and that the benefit from the improvement to property along the street was shared by such property, ratably according to its frontage. *Schaeffer* v. *Werling*, 188 U. S., 516. *French* v. *Barber Asphalt Paving Co.*, 181 U. S., 324; *Wight* v. *Davidson*, 181 U. S., 371; *Tonawanda* v. *Lyon*, 181 U. S., 389; *Webster* v. *Fargo*, 181 U. S., 394; *Cass Farm Co.* v. *Detroit*, 181 U. S., 396; *Detroit* v. *Parker*, 181 U. S., 399; *Wormley* v. *District of Columbia*, 181 U. S., 402; *Shumate* v. *Heman*, 181 U. S., 402; *Farrell* v. *West Chicago Park*, 181 U. S., 404; *King* v. *Portland*, 184 U. S., 61; *Voight* v. *Detroit*, 184 U. S., 115; *Goodrich* v. *Detroit*, 184 U. S., 432.

(b) The challenge of the statute as being unconstitutional in not affording non-residents equal protection of the law is doubtless based on the language of Section 5989, which provides that an improvement proceeding shall be inaugurated by the adoption and publication for two weeks of a resolution declaring the intention on the part of the city to improve the street. This is followed by this provision of the statute:

"If a majority of the resident owners of the property liable to taxation therefor shall not within ten days from the date of the last insertion of said resolution file with the city clerk their protest against such improvements, then the board of aldermen shall have the power to cause such improvements to be made, and to contract therefor and to levy the taxes herein provided." R. S. Mo., 1899, Vol. 2, Sec. 5989.

This language defines the extent of the authority granted and conferred by the legislative department of the state to the legislative department of the municipality relative to contracting for street improvements. The sovereign power of legislation, which, under our system of government, is vested in the state legislature subject only to the restrictions thereon contained in the state and Federal constitutions, is absolute. The legislative functionaries of the municipality have only such authority as is directly, or by necessary implication conferred upon them by the state legislature. The aldermen of the City of Westport have authority to improve a street at the expense of the abutting property owners only upon first adopting and publishing the resolution referred to followed by the absence of a protest from a majority of the resident owners whose lots are liable to pay for the improvement. That the judgment of resident property owners in general as to the necessity for the improvement, the time when it should be made and its character, is better than that of non-residents, is hardly open to argument. They are acquainted with the actual conditions by personal observation and experience. They have the opportunity to discuss these matters with those equally informed. It is practicable to obtain an expression from them. It would be impracticable to endeavor to search through foreign states and nations for an expression of opinion from non-residents as to the advisability of a local improvement.

It is the public policy of Missouri, as shown by repeated legislation, to allow residents of municipalities a determinative voice in deciding when local improvements shall be made and their character.

The Kansas City Charter, Article IX, Section 2, gives to resident owners of a majority of front feet of a street the right, by petition, to determine the character of street improvements.

The Statute of Missouri, R. S., 1899, Sec. 5683, provides that whenever a petition is required under existing laws for street improvements, "the petition shall be sufficient if signed by property holders owning a majority of the front feet of property owned by

residents of the city fronting on the street, sidewalk, alley or avenue or public highway, or part thereof proposed to be improved." This applies to all cities of the second class in that state.

And R. S. Mo., 1899, Sec. 5860, which is applicable to all cities of the third class in the state, provides, "if a majority of the resident owners of the property liable to taxation therefor shall not within ten days thereafter (*i. e.*, after the publication of a declaratory resolution) file with the city clerk of the city their protest against such improvements, then the council shall have the power to cause such improvements to be made and to contract therefor and levy the taxes as herein provided."

Again, R. S. Mo., 1899, Sec. 5989, which applies to all cities in this state of the fourth class, being the section now under consideration, has substantially the same provision as that last quoted.

Our sister state, Kansas, has the same policy. G. S. Kansas, 1899, page 165, Sec. 713, provides for the publication of a declaratory resolution, and thereafter, "if a majority of the resident owners owning a majority in square feet of the lots or real estate liable to taxation therefor shall not within twenty days thereafter file with the clerk of said city their protest in writing against such improvement, then said Mayor and council shall have power to cause such improvements to be made and contract therefor and levy taxes as provided by law." This applies to cities of the first class in the state of Kansas.

The same rule obtains in Kansas with reference to cities of the second class. G. S. Kan., 1899, page 227, Sec. 980.

A similar policy prevails in many other states. These laws have been on the statute books many years, and have been enforced, and have frequently come under judicial scrutiny, but never to our knowledge has one been held unconstitutional under the challenge now made.

The question has been ruled by our Supreme Court adversely to complainant's contention in the case of *Buchan* v. *Broadwell*, 88 Mo., 31. This was a case arising under the then Kansas City Charter, which required a petition of the residents of Kansas City, who owned a majority of the front feet of land upon the street to be improved, as jurisdictional to the authority of the common council to order the street improved at the expense of the abutting property owners. The court in an unanimous opinion disposes of the contention similar to the one now under consideration, in this language: "There is nothing in the constitutional objection made that non-resident property owners are discriminated against by Section 1, Article 8, of the charter, which provides that 'the common council on the petition of residents of Kansas City,

who own a majority of front feet on a street to be graded, may order the same to be graded at the expense of the property owners.' When it is done the same rule of assessment applies to all the property whether owned by residents or non-residents. *2 Dill. on Mun. Corp.*, Secs. 752, 802. The legislature in the exercise of its paramount control of the state could have authorized the council to have ordered the grading of streets at the expense of property owners without any petition. *Railroad Co.* v. *City of St. Louis*, 66 Mo., 228; *Farrar* v. *City of St. Louis*, 80 Mo., 379."

It would seem that the Legislature of a state in the exercise of sovereign legislative powers could confer upon, or withhold from, the legislative functionaries of a municipality within the state such a degree of legislative power relative to local affairs as their sovereign wisdom should dictate; in other words, that they could establish such checks upon the exercise of delegated legislative powers by a municipality as were deemed appropriate. It cannot be said that the extent of the power so conferred, the efficiency or weakness of that check upon the exercise of the power conferred, is a subject within the domain of constitutionally guaranteed rights of the citizen.

The right to practice law in the courts of a state is not a privilege or immunity of citizens of the United States. *Broadwell* v. *Illinois*, 16 Wall., 130. Nor is the right to sell intoxicating liquors. *Grozza* v. *Tiernan*, 148 U. S., 657. In delivering the opinion of the court in the case last cited the Chief Justice said: "The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. *Bartemeyer* v. *Iowa*, 85 U. S., 129."

Indeed the privilege and immunity clause of the Fourteenth Amendment does not guarantee a citizen of a state against laws of his own state. Its purpose is to guarantee the privileges and immunities of citizens in other states than their own. *The Slaughter-house Cases*, 16 Wall., 36; *Broadwell* v. *Illinois*, 16 Wall., 130.

How then can it be said that the circumstance that one or more remonstrators against a public improvement shall have the effect of curtailing municipal legislative authority with respect to that work is a privilege, immunity, or property right of a person of the character of those intended to be protected by the Federal Constitution?

Reasons for placing resident property owners of cities in a different class from non-residents, when the efficacy of a remonstrance of property owners in respect to the expediency of a local public improvement is under consideration, are founded in a wise public policy and are fortified by long established and widely extended customs.

This law treats all persons alike under like conditions both as to the privilege conferred in regard to signing remonstrances and the amount of tax to be levied to pay for the improvement.

In *Taggart* v. *Claypool,* 145 Ind., 590, was considered the validity of a statute providing for the extension of the city limits of certain cities in Indiana. It was urged that the statute was unconstitutional under the state and Federal constitutions because it granted the right of appeal to resident freeholders only, and denied an appeal to non-residents. The law was held valid, and the court in their opinion say:

"It is contended therefore, that as the right of appeal is given only to resident freeholders in the territory sought to be annexed, and the same right impliedly denied to owners of land in the territory who do not reside therein, they are denied the equal protection of the law, their property taken without due process of law, and that privileges and immunities are granted to such resident owners which are denied to plaintiffs on the same terms. * * * The convenience, safety and protection of a resident land owner in the territory may be, and very likely is, different from that of a non-resident land owner in the territory. The one may be interested in, and need, police and fire protection, water, light and gas, which the city might afford to him on slight cost; whereas the non-resident might not desire or have any use for such things, and hence ought no more, in justice, to have a voice in preventing the residents from securing these advantages than he should be allowed to vote on the levy of a local school tax in that territory, simply because he owned property therein. Therefore the grant of the right of appeal to the resident freeholders only is not a grant to any citizen or class of citizens of privileges or immunities which upon the same terms, do not equally belong to all citizens. The terms upon which they are to have a voice in the annexation is such an interest therein as a resident has. * * * In *Hayes* v. *Missouri,* 120 U. S., 68, Mr. Justice Field, speaking for the court, said: 'The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circum-

stances and conditions, both in the privileges conferred and the liabilities imposed.' To the same effect are *McPherson* v. *Blacker,* 146 U. S., 39; *Soon Hing* v. *Crowley,* 113, U. S., 709. We have already seen that all owners of land in the territory to be annexed are by the statute in question treated alike under like circumstances and conditions, and hence it does not deprive any one of the equal protection of the laws. Therefore the statute does not violate the Fourteenth Amendment to the Constitution of the United States."

In *Fidelity Mutual Life Assn.* v. *Mettler,* 185 U. S., 308, this court, in an opinion by the Chief Justice, held that equal protection of the law is not denied to life insurance companies by the provisions of a Texas statute imposing on such companies upon failing to pay a loss within the time specified in the policy, in addition to the amount of the loss, the sum of twelve per cent thereof as damages and reasonable attorney's fees, although such obligation is not imposed on other classes of insurance companies. The court fortified their decision with this language:

"The ground for placing life and health insurance companies in a different class from fire and marine insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges and benevolent associations of the character mentioned in the Texas statutes is not arbitrary classification but rests on sufficient reason."

In *Missouri Pacific R. Co.* v. *Mackey,* 127 U. S., 205, opinion by Mr. Justice Field, it is said:

"The objection that the Law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the cause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character: * * * * A law giving to mechanics a lien on buildings constructed or repaired by them for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to

keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed."

In *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S., 823, 293, opinion by Mr. Justice McKenna, it is said:

"The clause of the Fourteenth Amendment especially evoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax Cases*, 115 U. S., 321. It does not prohibit legislation which is limited, either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes* v. *Missouri*, 120 U. S., 68. * * * With these for illustration, it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned. * * *

The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation. In some circumstances, it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be of a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B (*Missouri P. Ry. Co.* v. *Mackey*, 127 U. S., 205), to a different measure of damages than B (*Minneapolis & St. L. Ry. Co.* v. *Beckwith*, 129 U. S., 26), and it permits special legislation in all of its varieties."

In *Head* v. *Daniels*, 38 Kan., 1, the constitutionality of the law of Kansas which requires a bond from the plaintiff to be first executed in attachment cases where defendants are residents of the State of Kansas, "but no undertaking shall be required where the party or parties defendant are non-residents of the state or a foreign corporation," was challenged as violative of the Federal and state constitutions. The court disposes of the contention with the words "We think the statute is constitutional and valid."

The Supreme Court of Missouri has upheld the validity of the laws of that state providing separate schools for colored children against the charge of being in conflict with the Fourteenth Amendment of the Federal constitution, although it was conceded that plaintiffs had to go three and one-half miles to reach a colored school while no white child in the district had to go more than two miles. The court adopts this language:

"Equality, and not identity of privileges and rights, is what is guaranteed to the citizen. * * * Color carries with it the natural race peculiarities which furnish the reason for the classification." *Lehew* v. *Brummell*, 103 Mo., 546.

Similar results have been reached in other states: *People ex rel. King* v. *Galligar*, 93 N. Y., 438; *State ex rel. Garnes* v. *McCann*, 21 Oh. St., 198; *Cory* v. *Carter*, 48 Ind., 327; *Ward* v. *Flood*, 48 Cal., 36; *Roberts* v. *City of Boston*, 5 Cush., 198.

In *Cameron* v. *Railway Co.*, 63 Minn., 384, a statute allowing plaintiff reasonable attorney's fees in actions brought under the statute to recover possession of lands taken without compensation by a railroad company for its right-of-way, was held constitutional. The court said:

"Legislation is not prohibited either by the state or Federal constitution, which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated. *Barbier* v. *Connolly*, 113 U. S., 32. The legislature, however, cannot adopt a mere arbitrary classification, even though the law be made to operate equally upon each subject of each of the classes adopted. The classification, to be valid, must be based upon some reason of public policy, growing out of the condition or business of the class to which the legislation is limited. But a law which is confined in its application to a particular class of persons is not void as unequal class legislation if the distinction is based on some reason of public policy, and applies to and embraces all persons alike under similar circumstances. *Nichols* v. *Walter*, 37 Minn., 264; *Allen* v. *Press Co.*, 40 Minn., 117; *Lavallee* v. *Railway Co.*, 40 Minn., 249. This right to classify persons, corporations and associations, and to impose upon them, as a class, duties and liabilities, or to confer upon them privileges, not imposed or conferred upon the whole people of the state, is a matter committed to the sound discretion of the legislature, subject to the supreme condition that the classification must not be arbitrary, but must be based upon some natural reason of public policy."

Lent v. *Tillson*, 140 U. S., 316, upholds as valid against the charge of unconstitutionality a law granting to a majority in values

of the property owners fronting on a street the power by protest to defeat the improvement of the street.

A classification of railroads for the purpose of taxation by the length of their lines is sustained as lawful classification. *Dow* v. *Beidelman,* 125 U. S., 680.

A state may provide for different appellate courts with different jurisdictions and rules of practice for different portions of the state. *Missouri* v. *Lewis,* 101 U. S., 22.

The law allowing double damages for killing stock by railroads is constitutional. *Railroad* v. *Beckwith,* 139 U. S., 26.

In *Clark* v. *City of Kansas City,* 176 U. S., 114, an act authorizing cities to extend their limits, and to exclude therefrom lands inside those limits used for agricultural purposes, when the same is not owned by a railroad or other corporation, was held valid. The court in an opinion by Mr. Justice McKenna, said:

"In the case at bar the distinction is between tracts of agricultural lands in a certain relation to cities and lands used for other purposes in such relation.

"We think the distinction is justified by the principle of the cases we have cited. That principle leaves to the state the adaptation of its laws to its conditions. The growth of cities is inevitable, and in providing for their expansion it may be the judgment of an agricultural state that they should find a limit in the lands actually used for agriculture. Such use, it could be taken for granted, would be only temporary. Other uses, certainly those to which the plaintiff puts its lands, can receive all the benefits of the growth of a city and not be moved to submit to the burdens. Besides, such uses or manufacturing uses adjacent to a city may, for its order and health, need control. Affecting it differently from what farming uses do, may justify, if not require, their inclusion within the municipal jurisdiction.

"We think, therefore, that within the latitude which local government must be allowed the distinction is not arbitrary, and infringes no provision of the Constitution of the United States."

(c) The inquiry as to the constitutionality of the clause of the Missouri statute making effective the timely remonstrance of a majority of the resident owners of property liable to taxation for a street improvement in disqualifying the Board of Aldermen from proceeding to authorize and contract for the improvement is, upon this record, a moot question.

Suppose this attempted check upon the power of the Board of Aldermen to legislate in respect to the improvement of city streets is void because the privilege or power of remonstrance is

conferred on residents alone, when it should have been conferred on all property owners. Then this clause or check upon the exercise of that legislative power comes out of the law. But, unless this clause, this check, is so intimately connected with the subject matter of the legislation that it cannot be presumed the legislature would have enacted the statute without the vicious provision, the remainder of the law will be preserved.

In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 326, opinion by Mr. Justice Brewer, it is said:

"It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently, of that beyond its power."

In *Huntington* v. *Worthen*, 120 U. S. 97, 102, Mr. Justice Field, speaking for the court, said:

"It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected."

The presumption is not to be indulged that the legislature of the state would have withheld the conference of power upon the numerous and growing cities of the fourth class in a great state to improve their streets unless that power were conditioned wholly upon the absence of a remonstrance from a majority of the resident owners of land abutting upon the street to be improved.

Indeed, power to so legislate is expressly conferred upon such cities in a different section of the statute from that containing the criticised words, in this language:

"The cities coming under the provisions of this article in their corporate capacity are authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by law. * * * Second: To open and *improve* streets, avenues, alleys and other highways, and to make sidewalks and build bridges, culverts, drains and sewers within the city, and to establish grades for all improvements herein mentioned. Cities of the fourth class shall have and *exercise exclusive control over all streets,* alleys, avenues and public highways within the limits of such cities." R. S. Mo., 1899, Vol. 2, Sec. 5979.

It is a conceded fact that neither the complainant nor any other non-resident, or any property owner whatever, undertook to protest against the improvement. Is it to be assumed that if a substantial number of property owners had remonstrated to the Board of Aldermen of the city against the improvement that such voice would not have been effectual? At least no such effort was made and therefore no constitutional right was denied the complainant. The Chancellor before whom this case was tried disposed of this contention with this language:

"If the resolution or proceeding could be defeated by protest, and if complainant had the same right to protest, not by the statute, but under the Constitution as a resident owner had, then why did he not protest or offer to protest? And must he not do that or offer to do that which was required of a resident, before he can claim that he is denied equal protection? It seems clearly so to me, and a discussion of, or deciding the question, is wholly academic." (Transcript of Record, p. 518.)

V.

INTER-STATE COMMERCE NOT INVOLVED NOR UNLAWFULLY RESTRAINED.

Neither the allegations of complainant's bill, nor his proof in regard to the specification and use of Trinidad Lake asphalt as the material with which the paving contracts in question were executed, the defendant's ownership or control of that material and the source from which it was derived, bring the transaction within the ban of the Act of Congress of July 2, 1890, relative to monopolies, or the commerce clause of the Constitution of the United States.

The complainant charged in his bill that the defendant, the city engineer, the Board of Aldermen and Mayor of the City of Westport caused to be specified in the resolutions, ordinances and contracts for the paving in question that the pavement should consist of genuine Trinidad Lake asphalt; and this charge, coupled with the allegation that the defendant had the sole right to use the Trinidad Lake asphalt, a product alleged to be produced outside of the United States, constitute the ground for the conclusion

reached by him that the city and the defendant, at or near the dates alleged, monopolized or attempted to monopolize, combined and conspired with the city authorities and other persons unknown to complainant, to monopolize the trade and commerce among the several states contrary to the Act of Congress of 1890.

Complainant's proof tends to show that defendant company did not own or control the source of supply of Trinidad Lake asphalt; that there were many companies using this material for paving purposes; that there were many other asphaltic cements on the market, thought by a witness to be equally as good for street paving purposes as the Trinidad Lake asphalt.

The City of Westport was by law obligated to keep its streets in repair. It alone had the power of determining when and with what material its streets should be paved, and of entering into contracts for such improvements. It was a city within the State of Missouri. The defendant Paving Company was a corporation, lawfully engaged in the business of laying Trinidad Lake asphalt street pavements within that state. The Paving Company, with commendable enterprise and diligence, brought to the attention of the property owners along the streets to be improved the good qualities of the kind of material it used in constructing street pavements. It, through its representatives, discussed with them its qualities of cleanliness, its endurance, its price and general adaptability and success as a pavement for city streets. And the property owners resident in the city, who were most vitally interested in having a good street pavement by reason of their ownership of property abutting on it, and because they would be required to pay for it, either of their own volition or upon the request of the representatives of the Paving Company, who had this material to sell, petitioned in writing the city authorities to cause the street to be paved with a Trinidad Lake Asphalt pavement of certain dimensions, the price of which should not exceed a stated sum, and which should be guaranteed to endure at least five years after completion. Such petitions, when executed and presented in good faith, and as the expression of the wishes and judgment of interested citizens in respect to a local public improvement such as this was, so far from being the subject of strictures and vituperative abuse, are to be commended as favorable to a wise corporate development and the exercise of a right guaranteed by the Constitutions of the United States and the State of Missouri. The officers of the municipality, doubtless in a measure influenced by the petition of property owners, in a measure by their knowledge of the merits of the paving material and the value of a guarantee, learned from the representatives of the parties having it to sell, and their own observation of the satisfactory char-

acter of the pavements made of it, adopted a resolution expressive of their own judgment that they deemed it necessary to pave the street to a stated extent and with a Trinidad Lake asphalt pavement. This resolution as to Wyandotte street was adopted July 15, 1897. (Transcript of Record, p. 171.) It was then published in the newspaper published in the city authorized to print such publications for ten days, and, after the lapse of more than ten days thereafter, during which time the owners of a majority in front feet of the lots abutting on the part of the street under consideration for improvement, might by remonstrance have disqualified the municipal authorities from ordering the improvement, when no person, not even complainant, offered any remonstrance or protest, the Mayor and Board of Aldermen on September 3, 1897, enacted an ordinance ordering the paving of the street conformable to the terms of the Declaratory Resolution. (Transcript of Record, p. 172.) Thereupon bids were solicited by advertisement for ten days, and in due time the bids of two competing companies were received, viz., the Barber Asphalt Paving Company and the Parker-Washington Paving Company. The proper authorities awarded the contract to defendant as the lowest and best bidder therefor, which contract was signed and duly confirmed by ordinance of the city on September 22, 1897 (Transcript of Record, p. 181), and the work was completed by the Paving Company before the levy of the assessment therefor on November 15, 1899. (Transcript of Record, p. 184.) Every act complained of from the drafting of the petitions for this improvement, including the entering into the contract and the completion of the work, and issuance and delivery of tax bills to pay the price of the work, was done within the limits of the City of Westport in the State of Missouri. The substance of the transaction inveighed against was the construction of a street pavement in that city. The tools and labor for the grading and rolling; the rock, sand and hydraulic cement are not charged or proved to have been acquired elsewhere than in that city; and there is no proof as to where defendant purchased or acquired ownership of the Trinidad Lake asphalt used in the work. As an incident only to that work it happened that the asphalt used as the matrix of the pavement at some time came from the island of Trinidad, off the coast of South America.

This transaction does not constitute commerce among the several states, or with foreign nations.

It has been held in *Pacific Express Co.* v. *Seibert*, 142 U. S., 339, opinion by Mr. Justice Lamar, that business done within a

state, although transacted by a corporation engaged in interstate business, was not interstate commerce.

It has been uniformly held in Missouri that the city authorities may select, designate and use materials for street paving purposes, although the same are patented and although the supply may be subject to the control of a monopoly. *Barber Asphalt Paving Co.* v. *Hunt,* 100 Mo., 22; *Warren* v. *Barber Asphalt Paving Co.,* 115 Mo., 572; *Verdin* v. *St. Louis,* 131 Mo., 26.

In the case last cited, which was determined on a demurrer to a petition, the petition charged that the Barber Asphalt Paving Company controlled Trinidad Lake asphalt; that there were other asphalts equally as good as the Trinidad Lake; that by specifying Trinidad Lake asphalt as the material to be used in the pavement, the price thereof was increased, etc. It was ruled by the court *in banc* that the petition in this respect did not state facts sufficient to constitute a cause of action to cancel tax bills issued in payment of the price of the work.

The official proceedings of the City of Westport, relative to paving its streets, the specifications for such pavements and the contracts then made between that city and a corporation authorized by law to conduct its business there, relative to paving its streets, and the execution of that work, although the material used in the work might at some time have come from a foreign state or nation, do not constitute interstate commerce.

In the leading case of *United States* v. *E. C. Knight Co.,* 156 U. S., 1, the Chief Justice in delivering the opinion said:

"It was in the light of well-settled principles that the Act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. * * *

"The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. * * *

"The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacture does not determine the time when the article or product passes from the control of the state and belongs to commerce. This was so ruled in *Coe* v. *Erroll,* 116 U.

S., 517, in which the question before the court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the State of Maine were liable to be taxed like other property in the State of New Hampshire. Mr. Justice Bradley, delivering the opinion of the court said: 'Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. * * * There must be a point of time when they ceased to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the state of their origin to that of their destination.' * * *

"Contracts, combinations or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy."

In *Addyston Pipe & S. Co.* v. *United States*, 175 U. S., 211, opinion by Mr. Justice Peckham, it is said:

"The power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the states. * * *

"The fact that the proposal called for the delivery of pipe in the same state where some of the defendants resided and carried on their business would be sufficient, so far as the act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to some one outside of the state as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own state could not be reached by the Federal power derived from the commerce clause in the Constitution."

In *Hopkins* v. *United States*, 171 U. S., 578, opinion by Mr. Justice Peckham, it is said:

"The first inquiry to be made is as to the character of the business in which defendants are engaged, and if it be not interstate commerce, the validity of this agreement not to transact their business with non-members does not come before us for decision. * *

"Charges for the transportation of cattle between different states are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for services of this nature do not immediately touch or act upon, nor do they directly affect the subject of the transportation. * * *

"They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature.

"It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the land owners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the land owners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the land owners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the states? Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the act because

horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one state to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at their place of destination to the cattle yards where sold for less than a minimum sum, come within the statute? Would an agreement among themselves by locomotive engineers, firemen or trainmen engaged in the service of an interstate railroad, not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

"In our opinion all these queries should be answered in the negative."

In the case of *Anderson* v. *United States*, 171 U. S., 604, opinion by Mr. Justice Peckham, it is said:

"Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith* v. *Alabama*, 124 U. S., 465, 473: 'There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void."

Attempts to monopolize or the act of monopolizing a part of the commerce among the states or foreign nations which promote, or only indirectly or incidentally restrict competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, are not intended to be and were not made illegal by the anti-trust act of July 2, 1890, because such attempts are indispensable to the existence of any competition in commerce among the states.

The terms of the Act of July 2, 1890, applicable to this controversy provide: Section 1. "Every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade, or commerce among the several states, or with foreign nations, is hereby declared to be illegal," etc.

Section 8 of Article 1 of the Constitution of the United States grants to Congress the exclusive power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The gravamen of complainant's grievance is that defendant persuaded the city, acting pursuant to a lawful grant of authority so to do, to specify a certain material with which certain streets should be paved, which material the defendant could furnish and which complainant charges defendant alone could furnish, and which was originally procured from a foreign nation and that such specified material was used in the pavement by defendant conformable to that specification and a contract therefor.

The act under consideration is to be given a reasonable and a common sense construction. It has been repeatedly ruled that persons having a commodity to sell, who were not engaged in rendering public or *quasi* public service, have the right to fix the price at which they will sell that commodity and to decline to sell it at any other price, and the right to fix the terms upon which a sale shall be made and to what persons it will sell, or will refuse to sell, and the territory within which the purchasers shall dispose of such merchandise. It was not the purpose of this act to deprive persons of any of these rights. One court have said, "If there had been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade."

And in the same opinion it is said:

"But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by Section 2 of the Act of July 2, 1890, 26 Stat., 209? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it and competition necessarily ceases—dies." *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep., 454.

In *United States* v. *Joint-Traffic Ass'n*, 171 U. S., 505, opinion by Mr. Justice Peckham, it is said: "In *Hopkins* v. *United States*, decided at this term, we have said that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. * * *

"To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

If complainant's construction of the statute, as applied to the facts of the case at bar, is adopted, the purpose and effect of the law will be adjudged to be to blight, restrain and suppress trade and commerce, rather than to promote and develop it. What transaction of barter or trade is accomplished unless at some stage of the negotiation the parties agree, combine, or conspire together that one shall furnish and deliver to the other some product or process of a defined and specific character which he controls or expects to procure? And is the transaction to be adjudged illegal because the product once came from one particular place rather than another, or by reason of the fact that the party engaged so to

do, alone can furnish it? Will anyone seriously argue that a municipality acting within the limits of the grant of its charter powers may not make a contract with a person or corporation to supply its workhouse with Pear's soap, or its hospital with Cream of Wheat from a designated manufacturer, or contract to use a certain paint of approved formula or manufacture? Is it to be argued that a few neighborly housewives cannot agree that they will each purchase a number of pounds of tea of a designated character of excellence produced in a foreign country, and give a joint order to their grocer to procure at a certain price the coveted delicacy for them without laying themselves liable to a fine of five thousand dollars and imprisonment for a violation of the anti-trust law?

Take the instance of a public building: If a person, having a quarry lying without the United States from which is produced a marble or granite particularly adapted as to the qualities of durability and beauty for such structures, goes before the supervising architect or the controlling authorities and by bona fide and honest representations of the character of his material induces them, in the exercise of the discretionary power with which they are invested, to specify and order the building to be constructed of that material, and to advertise for bids for the work according to those specifications, and he then becomes the successful bidder and enters into a contract to build the structure as specified and he completes it with the material designated and it is accepted by the proper authority as having been executed according to contract, is it to be held that that person is then to be defeated in the recovery of the contract price of the building, and is liable to a fine and imprisonment because the transaction, taken as a whole, is a combination or conspiracy between the contractor and the public officials and is violative of the Federal law relative to monopolizing foreign or inter-state commerce?

It would seem to one disinterestedly considering the effect of such a purpose and transaction as are described in the bill of complaint, that the successful attempt of the Paving Company to procure a contract with the City of Westport to pave its streets with Trinidad Lake asphaltum and the execution of that contract, promoted and enlarged commerce between the states and foreign nations more than would have occurred had some denizen of the municipality procured a contract to pave the same streets with rock or brick taken from within the limit of the town itself. And so it is with all such efforts to sell products by those actively engaged in the vocation of making or distributing subjects of trade. The record shows that complainant endeavored to establish that there were many other kinds of asphalt successfully used in street paving, which, if the

city authorities had deemed it wise to do so, might have been adopted and used for the improvements in contemplation. In the exercise of the discretion by law vested in them, the municipal authorities designated a particular kind of material. This was forthcoming through the usual channels of trade and the streets were paved. The logic of complainant's contention is they should have designated *all* kinds of materials, in which event, doubtless, no pavements would have been laid.

The proposition involved in this contention has been thoughtfully considered and decided by a unanimous court in the Circuit Court of Appeals for the Eighth Circuit in the case of *Whitwell* v. *Continental Tobacco Company*, 125 Fed. Rep., 454. And again by the same court in *Phillips* v. *Iola Portland Cement Company*, 125 Fed. Rep., 593. In the latter case in the opinion by Sanborn, C. J., it is said:

"It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. *Hopkins* v. *U. S.*, 171 U. S., 578, 592; *Anderson* v. *U. S.*, 171 U. S., 604, 616; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S., 505, 568; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S., 211, 245; *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S., 290; *U. S.* v. *Northern Securities Company*, 120 Fed., 721."

We respectfully submit in behalf of the Barber Asphalt Paving Company (1) that the Circuit Court of the United States for the Western Division of the Western District of Missouri was without jurisdiction in this cause and that the judgment of that court should be reversed and complainant's bill dismissed; (2) the

earned court erred in adjudging and decreeing that the contract nd official proceedings relative to the pavement of Wyandotte treet in the City of Westport were illegal and void because the treet had, about five years previously to the laying of the asphalt avement under the contract referred to, been macadamized, when he complainant's bill did not allege that the ordinance was unreas- nable or confiscatory, and when the proof did not warrant that conclusion for the reason stated or for any other reason; and that he decree of the court in that respect should be modified so as to leny the complainant any relief; (3) that there is no merit in the complainant's appeal.

Respectfully submitted,

W. C. SCARRITT,
J. K. GRIFFITH,
ELLIOTT H. JONES,
Counsel for Barber Asphalt Paving Company.

EDWARD L. SCARRITT,
Of Counsel.

APPENDIX.

The following sections of the General Statutes of Missouri relating to cities of the fourth class embrace all the provisions of that law relative to the power of those cities to pave streets and to issue tax bills to pay the price of such pavements, and they include Sections 85 to 95 inclusive of the Act of the General Assembly of the state relative to cities of the fourth class, approved April 11, 1895. Laws of Mo., 1895, p. 65.

R. S. Mo. 1899, *Vol. 2, Sec.* 1579. *Empowering board to levy tax for general revenue—open streets, etc.* The cities coming under the provisions of this article, in their corporate capacities are authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by law:

First: To levy and collect taxes for general revenue purposes on all mixed, personal and real property within the limits of said city, taxable according to the laws of this state.

Second: To open and improve streets, avenues, alleys and other highways, and to make sidewalks and build bridges, culverts, drains and sewers within the city, and to establish grades for all improvements herein mentioned. Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city.

Sec. 5980. *Street grading, etc., paid for by city.*—The cost of bringing to grade all streets, avenues, alleys and other highways, and for the building of bridges, culverts, public sewers and footwalks across streets, avenues, alleys and other public highways, shall be paid out of the general revenue fund of the city.

Sec. 5982. *Macadamizing, etc., of streets charged to abutting property.*—The cost of paving, macadamizing, guttering and curbing (where such curb is set out into the street beyond the sidewalks) all streets, avenues, alleys and other highways, or any part thereof or any connection therewith, and repairing the same, and for doing all excavating and grading necessary for the same, after said streets, avenues, alleys and other highways, or parts thereof or connections therewith, have been first brought to grade, as hereinbefore provided, shall be levied as a special assessment upon all lots and pieces of ground upon either side of such street, avenue, alley or other highway, or part thereof or connection therewith, abutting thereon, along the distance improved, in proportion to the front foot.

Sec. 5983. *Paving squares and street-crossings—how paid for.*—The cost of paving or macadamizing the squares and areas as formed by the crossing or meeting of streets and other highways, or parts thereof or connections therewith, shall be levied as a special assessment and paid for as follows: Such area shall be divided into parts or portions by lines drawn lengthwise along the middle of each of said streets or highways so intersecting or meeting, and the cost of said parts or portions shall be levied as a special assessment against the block or square contiguous to each, and prorated against the lots or pieces of ground in such block or square abutting on the street improved.

Sec. 5984. *Tax-bills to issue for street improvements.*—The assessments made for making and repairing sidewalks and sidewalk curbing, and for paving, macadamizing, curbing and guttering all streets, avenues, alleys and other highways, and repairing the same, as herein provided, shall be known as special assessments for improvements, and shall be levied and collected as a special tax, and a special tax-bill shall issue therefor, and shall be paid in the same manner provided by ordinance. Said special tax-bills may bear interest after thirty days from the date of issue at the rate of eight per cent. per annum, and every such special tax-bill shall be a lien against the lot or piece of ground described in the same until the same is paid.

Sec. 5985. *Estimate to be made before work is ordered done.*—Before the board of aldermen shall make any contract for building bridges, sidewalks, culverts or sewers, or for paving, macadamizing, curbing, guttering or grading any street, avenue, alley or other highway, an estimate of the cost thereof shall be made by the city engineer or other proper officer and submitted to the board of aldermen, and no contract shall be entered into for any such work or improvement for a price exceeding such estimate: Provided; that no such estimate shall be required for the making of any local or special repairs.

Sec. 5986. *City may sue on tax-bills.*—All special tax-bills issued for special assessments for paving, macadamizing, curbing, guttering, excavating, grading, construction of sidewalks, and for district sewers, and for any other purpose whatever authorized by this article, shall be assignable and collectable in any action brought in the name of the city to the use of the holder thereof; but the city shall not in any event be liable for any cost that may accrue in such action. Such special tax-bills shall, in any action thereon, be prima facie evidence of the regularity of the proceedings for such special assessment, of the validity of the bill, of the doing of the work and of the furnishing of the materials charged

for, and of the liability of the property to the charge stated in the bill.

Sec. 5987. *Tax-bills to be paid in three annual payments, when.*—The total cost of paving, macadamizing, curbing, guttering and the necessary excavation and grading for the same, of any street, avenue, square or alley, or other highway or any part thereof, may be paid in three annual payments, one-third in one year, one-third in two years and one-third in three years from the date of issue of the special tax-bills, each payment to bear not to exceed eight per cent. interest per annum from date of issue to date of payment: Provided, that the owner of any lot or parcel of ground fronting on such street, avenue, alley or other highway, or square or part thereof improved, shall, within thirty days after the letting of the contract for such work, notify the city clerk, in writing, that he desires to pay the same in three annual payments. In such cases the city clerk, engineer or other proper officer shall make out three special tax-bills, which shall be signed by the mayor and attested by the city clerk, each for one-third part of the cost of such work, bearing interest as aforesaid, which rate shall be fixed by ordinance, and deliver the same to the contractor for the work. Each and every such tax bill shall be a lien on the lot or parcel of ground therein described, and such lien shall continue for one year from the maturity of the tax-bills last becoming due, until paid, or until the final determination of any legal proceedings to collect the same; but no such suit shall be brought on any such tax-bill until after the maturity of all such tax-bills.

Sec. 5989. *Notice of intention to improve streets to be published—Tax-payers may protest—Contract to be let to lowest bidder—Sidewalks repaired without notice—Contractor, how paid.*—When the board of aldermen shall deem it necessary to pave, macadamize, gutter, curb (when such curbing is set out into the street beyond the sidewalk) or otherwise improve any street, avenue, alley or other highway, or any part thereof, within the limits of the city, for which a special tax is to be levied as herein provided, the board of aldermen shall, by resolution, declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvements, then the board of aldermen shall have power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided; and the finding of the board that a majority of such

owners have not filed protest, shall be conclusive and final. No such publication shall be necessary for the making of any sidewalks, but upon petition of any ten citizens of the city the board of aldermen shall have power to make contracts for the construction of sidewalks, including grading therefor, with or without curbing, along any street, avenue or other public highway, or any part thereof whatever. Such contract shall be let to the lowest and best bidder, upon plans and specifications filed therefor by the city engineer or other officer designated by the board of aldermen, with the city clerk, not less than one week's advertisement for bids thereupon being made in some newspaper published in the city. When upon proper advertisement no bid is received, the board of aldermen may proceed as provided in section 5992. No formality whatever shall be required to authorize the repairing of sidewalks, or of street or other paving, curbing, guttering, macadamizing, or part thereof, or reconstructing the same, and making assessments therefor, but the proper officer or committee on improvements may, without notice, cause such work to be done, keeping an account of the cost thereof, and reporting the same to the board of aldermen for assessment; and each lot or piece of ground abutting on such sidewalk, street, avenue or alley, or part thereof, shall be liable for its part of the cost of such work made along or in front of such lot or piece of ground, as reported to the board of aldermen. The board of aldermen may provide a penalty for failure to pay such special tax within a given time, and any tax-bills issued in payment of such repairs shall constitute a lien upon the property liable therefor until paid. All costs for building and constructing sidewalks shall be paid to the contractor therefor, in special tax-bills, assessed against the abutting property liable therefor, and such tax-bills shall constitute a lien upon such property until paid, and shall bear interest at eight per cent. per annum from date of issue, except as provided in section 5992.

Supreme Court of the United States.

Nos. 201 and 202.—October Term, 1903.

201	Richard H. Field, Appellant, vs. The Barber Asphalt Paving Company.	Appeals from the Circuit Court of the United States for the Western District of Missouri.
202	The Barber Asphalt Paving Company, Appellant, vs. Richard H. Field.	

[May 31, 1904.]

Mr. Justice Day delivered the opinion of the Court.

These cases are appeals from the decree of the Circuit Court of the United States for the Western District of Missouri. Richard H. Field, as owner of certain lands abutting on Main street, Baltimore avenue and Wyandotte Street in Westport, Missouri, which city was then a suburb and has since become a part of Kansas City, filed a bill of complaint against the paving company. The relief sought was against certain tax bills, issued to pay for the paving of the above-named streets, held by the defendant company, and to have the same declared void because (1) the act under which they were assessed violated the Fourteenth Amendment to the Constitution of the United States; (2) that the paving in question was unnecessary and the contract for the same was the result of undue and illegal influence on the part of the agents of the defendant company exercised upon the board of aldermen of the city of Westport; (3) that the contracts for the paving required the same to be constructed of Trinidad Lake asphalt, thereby cutting off competition with other kinds of asphalt suitable for street paving; (4) that the proceedings and agreements by which such asphalt was designated in the resolutions, ordinances and rules for the construction of said pavements were in violation of the interstate commerce clause of the Constitution of the United States (art. 1, sec. 8); and (5) that the said resolutions, ordinances and contracts and the action of the defendant company in securing the same were in violation of the Federal anti-trust act of July 2, 1890.

Upon the trial, the Circuit Court held against the prayer of the complainant for relief upon the Federal grounds alleged, but, holding that the paving of Wyandotte street was unnecessary, granted the prayer of the bill as to the tax bills issued for work done on that street, and dismissed the bill as to the other two streets.

From so much of the decree as held the tax bills for the work done on Wyandotte street invalid the paving company also appealed. (Case No. 202.)

A motion was filed by the appellant to dismiss the appeal of the paving company, which was postponed to the hearing of these appeals upon the merits. An examination of the motion and a consideration of the briefs filed and arguments made in support of and in opposition to the same leads us to the conclusion that it cannot be sustained. The appellant appealed directly to this court; for while there was an allegation of diverse citizenship in the bill, jurisdiction was also invoked on the constitutional grounds above stated. This made the case appealable directly to this court under section 5 of the act of March 3, 1891, (1 Comp. Stat. U. S. 549,) as one which "involves the construction or application of the Constitution of the United States."

The contention is that the prayer of the complainant on the constitutonal grounds having been denied, the appeal of the respondent should have been to the Circuit Court of Appeals. But we cannot agree to this view. There was no cross bill filed in the case and none was required. The bill of complaint contained allegations sufficient to make a case of alleged violation of constitutional rights. It is well settled that in such cases the entire case may be brought to this court by the appeal. In *Holder* v. *Aultman-Miller Co.*, (169 U. S. 81–88,) discussing the act of March, 1891, Mr. Justice Gray said:

"Upon such a writ of error, differing in these respects from a writ of error in the highest court of a State, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. (*Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Penn. Ins. Co.* v. *Austin*, 168 U. S. 685.)" *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472.

See also *Chappel* v. *United States*, (160 U. S. 499–509;) *Horner* v. *United States*, (143 U. S. 570–77.)

If, therefore, the whole case can come to this court by direct appeal under the allegations of this bill, and if all the questions, Federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. If he fails to take such appeal the correctness of the decision as against him will be presumed. (*Railroad Company* v. *Flanders*, 12 Wall. 130; *Chittenden* v. *Brewster*, 2 Wall. 191–6.)

The motion to dismiss the cross appeal must be denied.

Coming to the merits of the case, the grounds of Federal relief will first be considered. It is claimed that certain sections of the act of the general assembly of Missouri, which make the tax bills levied to pay the contract price for the paving a lien upon the complainant's real estate, deprive him of his property without due process of law, and deny to him the equal protection of the laws. This argument is predicated on section 5989 of the Revised Statutes of Missouri.

The exact point of objection is that the improvement is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, which privilege of protest is not given to non-resident owners, thereby discriminating against them. It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. (*Kentucky Railroad Tax Cases*, 115 U. S. 321; *Hayes* v. *Missouri*, 120 U. S. 68; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Gulf, Colorado & Santa Fe Railroad* v. *Ellis*, 165 U. S. 150.) The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-residents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike. It has been held to be within the power of the legislature of Missouri to authorize the council to order the improvement to be made without consulting property owners. (*Buchan* v. *Broadwell*, 88 Mo. 31.) If the legislature saw fit to give to those most directly interested and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the Constitution.

Further objection on Federal grounds is urged, in that the specification of Trinidad Lake asphalt for this improvement is in violation of the interstate commerce clause of the Constitution of the United States, and of the so-called Sherman act of July, 1890. The right to provide for this paving was vested by the Missouri statute in the board of aldermen. The right to select the material for the paving was vested in that body; they saw fit to choose Trindad Lake asphalt for the paving. Their right so to do, under the charter powers of such cities as Westport, notwithstanding competitive bidding is thereby rendered impos-

sible, has been sustained by the Supreme Court of Missouri. (*Barber Asphalt Paving Co.* v. *Hunt*, 100 Mo. 22; *Warren* v. *Paving Co.*, 115 Mo. 572; *Verdin* v. *St. Louis*, 131 Mo. 26.) With the wisdom of this choice the courts have nothing to do, and in this case we are only concerned to inquire as to the alleged violation of Federal rights in such selection. The argument is that Trinidad Lake asphalt, being a product of a foreign country and brought into Missouri, and there being other deposits in other States within the United States from which suitable asphalt could be had, the specification of this kind of asphalt is an interference with and a regulation of interstate commerce, in violation of the exclusive right of Congress conferred by the Constitution. It is unnecessary to cite largely from cases in this court, which hold that only such acts as directly interfere with the freedom of interstate commerce are prohibited to the States, (*Kidd* v. *Pearson*, 128 U. S. 1,) in which case, Mr. Justice Lamar, speaking for the court, said (p. 23): "As has been often said legislation [by a State] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution." (*Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 177, and cases cited in the opinion.) The right of a State in the exercise of the police power to make regulations which indirectly affect interstate commerce has been frequently sustained. In the present case it may be that the use of this kind of asphalt, under municipal authority conferred by the State, will in a limited degree affect interstate commerce, but it certainly is not one of those direct interferences with the power over and express control of the subject given by the Constitution to Congress. In this day of multiplied means of intercourse between the States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation.

The attempt to invoke the provisions of the Sherman act in this case is equally unavailing. That act has been recently considered in the Northern Securities cases, decided at this term, and its construction and the nature of the remedies under it determined. It is not intended to affect contracts which have a remote and indirect bearing upon commerce between the States. (*Hopkins* v. *United States*, 171 U. S. 578; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211.)

In addition to the ground by which Federal jurisdiction was established in the courts below, it is alleged that the tax bills should be held void because they were obtained by undue influence of the agents of the paving company, improperly exercised to obtain the needed municipal action. The court below held, and an examination of the testimony has brought us to the same conclusion, that there was nothing in the case to establish

the charges of fraud and corruption, although the record does show that an agent of the defendant company was active and perhaps influential in obtaining signatures to the petition which specified Trinidad Lake asphalt for this improvement, yet in the absence of proof of fraud or corruption we do not think the contract and resulting levies can be set aside for this reason. It is one thing to disapprove of such measures as a matter of propriety of action, but quite another to set aside a contract, especially after the full performance of its terms.

Upon the cross appeal, the learned judge in the court below held that the Wyandotte street tax bills were void, because that street had been previously paved with macadam in the years 1892–1893, four or five years before the asphalt paving was laid, which macadam he found to be in good condition, and but little worn. The effect of this decree was while finding against complainant as to the allegations of fraud and collusion in obtaining the contract, to hold that, in the opinion of the trial judge, the repaving of Wyandotte street was unnecessary. We think this conclusion overlooks the fact that the power to construct, improve and pave streets was vested by the law of Missouri, as it generally is, in the board of aldermen. (Laws of Mo., 1895, 65, § 85 to § 95, inclusive.) The necessity of such improvements is a matter of which they are the exclusive judges, and their judgment is not to be interfered with by the courts, except in cases of fraud or gross abuse of power. This power of the city board is a continuing one, and the mere fact that a pavement has been once laid does not require the interference of the courts when the governing body of the city, in the exercise of its judgment, has determined that the necessity for repaving has arisen. The law has vested this power in the representatives of the city and the courts are not at liberty to determine whether the judgment is exercised wisely or unwisely. If this were not so, a contractor, who acts under the direction and because of the action of the city authorities in determining the necessity of an improvement, must lose his compensation, if, upon the suit of a property owner, the courts shall take a different view of the necessity of the improvement. In other words, the contractor, though acting in good faith and complying in all respects with his agreement, lawfully made, must abide the judgment of the courts as upon appeal from the tribunal solely empowered by law to pass upon the necessity of the improvement, and to make the necessary contracts to carry it out.

As we have said, there may be cases of fraud or arbitrary abuse of power, when the courts will intervene. Under other circumstances the municipality and property owners interested are bound by the acts of their agents. The authorities amply sustain this view. (2 Dillon Mun. Corp. 4th ed. sec. 686; *Wabash R. R. Co.* v. *Defiance*, 167 U. S. 88; *Skinker* v. *Homan*, 148 Mo. 349; *Warren* v. *Paving Co.*, 115 Mo. 580.)

Applying the principles settled by the authorities to the facts disclosed in this case, we do not find such evidence of fraud or gross abuse of power as would warrant the setting aside of the tax bills for this improvement. The testimony tends to show that the macadam was considerably worn; its replacement, to the extent of laying an asphalt pavement on top of it, was deemed necessary by the city authorities. It does not appear that any protest or objection was made during the progress of the work. A majority of the resident owners of lots abutting upon the part of the street to be improved had petitioned for the asphalt pavement. There is considerable testimony tending to show that the value of abutting property was enhanced by the improvement. These and kindred matters were before the board. It is not our province to review their judgment, and we do not think the courts are authorized to interfere with the discretion vested in them in making the improvement under the circumstances shown. To hold otherwise would be, as we have said, to substitute the judgment of the court as to the expediency or necessity of making such improvement for that of the body delegated by law with the power and responsibility of action in the premises.

The court below, having properly held that the case alleged must fail on the other grounds, should have regarded the judgment of the board of aldermen as to the necessity of repaving Wyandotte street as conclusive upon it. The conclusion reached renders it unnecessary to consider whether the complainant, having failed to protest or object to the work before it was begun or during its progress, can be heard in a court of equity to object to the tax bills assessed for the benefit of the contractor after the work is completed in compliance with the contract.

We think the court below erred in adjudging the tax bills on Wyandotte street to be void, and so much of the decree is reversed with costs, the decree as to the other streets is affirmed, and the case remanded to the court below with instructions to dismiss the bill.

True copy.

Test:

Clerk Supreme Court, U. S.